TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 78.

R. M. HENNINGSEN AND EDWARD W. CLIVE, COPARTNERS; THE NATIONAL BANK OF COMMERCE OF SEATTLE, AND R. R. SPENCER, APPELLANTS,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND; SYLVESTER E. BROWN, DOING BUSINESS AS S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY; CARSTENS PACKING COMPANY; E. C. MacDOUGALL AND H. T. DINHAM, COPARTNERS AS E. C. MacDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE, AND THE C. B. SMITH COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED AUGUST 7, 1908.

(20,326.)

(20,326.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 361.

R. M. HENNINGSEN AND EDWARD W. CLIVE, COPARTNERS; THE NATIONAL BANK OF COMMERCE OF SEATTLE, AND R. R. SPENCER, APPELLANTS,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND; SYLVESTER E. BROWN, DOING BUSINESS AS S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY; CARSTENS PACKING COMPANY; E. C. MacDOUGALL AND H. T. DINHAM, COPARTNERS AS E. C. MacDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE, AND THE C. B. SMITH COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 10, 1906.

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a United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation), and R. R. SPENCER, Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Interveners SYLVESTER E. BROWN, Doing Business as S. E. Brown & Company, BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation); CARSTENS PACKING COMPANY (a Corporation); E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MacDougall & Company; W. O. NELSON, E. E. CAINE, and THE C. B. SMITH COMPANY (a Corporation), Appellees.

Transcript of Record

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, Appellee,

vs.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants.

Stipulation Relative to Printing of Record.

It is hereby stipulated and agreed between the appellee, United States Fidelity and Guaranty Company of Baltimore, Maryland; the appellants, R. M. Henningsen and Edward W. Clives, copartners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer; and the interveners, Silvester E. Brown, (doing business as S. E. Brown & Company), Bryant Lumber and Shingle Mill Company, a corporation, Carstens Packing Company, a corporation, C. E. MacDougall and H. T. Dinham, copartners as E. C. MacDougall & Company, W. O. Nelson, E. E. Caine and the C. B. Smith Company, that in printing the record on appeal the following parts of the transcript may be omitted, the same being immaterial to the questions to be raised upon such appeal:

Date of Filing in Circuit Court.	Description of Omitted Part.
June 8, 1904.	Præcipe for appearance of complainant.
June 8, 1904.	Præcipe for process.
July 9, 1904.	Subpœna and return thereof.
July 12, 1904.	Præcipe for appearance of defendants.
Dec. 1, 1904.	Præcipe for appearance of interveners.
Dec. 29, 1904.	Two notices of hearing motions.
Jan. 5, 1905.	Cost-bill and notice.
Jan. 9, 1905.	Cost-bill and notice.
June 2, 1905.	Præcipe for transcript.

The title of the court and cause in all papers subsequent to the bill of complaint.

Index of the clerk of the Circuit Court, for which should be substituted index to printed record prepared by clerk of United States Circuit Court of Appeals.

Dated at Seattle, Washington, this 30th day of June, 1905.

G. E. DE STEIGUER,
Attorney for Appellants.
JAMES B. MURPHY,
Attorney for United States Fidelity and Guaranty Company of Baltimore, Maryland.
GEO. A. HAWLEY,
Attorney for Silvester E. Brown, Doing Business as S. E. Brown and Company.
3 BALLINGER, RONALD, BATTLE & TENNANT,
Attorneys for Bryant Lumber and Shingle Mill Company, a Corporation.
KERR & McCORD,
Attorneys for Carstens Packing Company, a Corporation, E. C. MacDougall and H. T. Dinham, Copartners, as E. C. MacDougall & Company.
WM. HICKMAN MOORE,
Attorney for W. O. Nelson, E. E. Caine, and the C. B. Smith Company, a Corporation.

[Endorsed:] No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity and Guaranty Company of Baltimore, Maryland, *vs.* R. M. Henningsen *et al.* Stipulation Relative to Printing Record. Filed July 5, 1905. F. D. Monckton, Clerk.

4 In the United States Circuit Court, District of Washington, Northern Division.

No 1205.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, Complainant,

vs.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE (a Corporation) and R. R. SPENCER, Defendants.

Bill of Complaint.

To the Honorable Judge of the Above-entitled Court:

The complainant for cause of action against the defendants, and each of them, alleges:

I.

That at all times herein mentioned, R. M. Henningsen and Edward W. Clive, were and still are copartners, contracting as such with the Government of the United States for the erection of certain buildings at Fort Lawton, in the State of Washington, and were and now are citizens and residents of the State of Washington.

5 II.

That at all of said times complainant was and now is a corporation, duly organized and existing, doing business under and by virtue of the laws of the State of Maryland, was and now is a citizen of the State of Maryland, and the defendant, the National Bank of Commerce, has been and now is a corporation, organized and existing under and by virtue of the laws of the United States, and doing business as a National Bank in the State of Washington, was and now is a citizen and resident of the State of Washington, and the defendant, R. R. Spencer, is, and at all such times has been its duly elected and qualified and acting manager and cashier, and has been, and is a citizen and resident of the State of Washington.

III.

That on or about the 12th day of May, 1903, the defendants, Henningsen and Clive, entered into a contract with the United States for the construction complete, at Fort Lawton, Washington, of four (4) certain buildings, fully described in said contract. That upon the execution of the said contract, the said defendants, were required to present with said contract a bond, conditioned amongst other things for the full completion of the said buildings, and for the full payment of the cost of all labor and materials entering into the con-

struction of said buildings, and that the said contractors exhibited the said contract to the complainant and applied to it to execute for them the said bond, and that the complainant in con-
6 sideration, among other things, of the law governing such cases, and especially the provisions of the United States Statutes making null and void any assignment or assignments, which said contractors might make of any sums becoming due them under said contract, and of the provisions in said contract for the retention by the United States of ten (10) per cent. of the total contract price named in said contract until the full completion and performance by the said contractors of said contract, consented to become surety for the said contractors, and did under date of May 15th, 1903, make, execute and deliver a bond to the United States, in which bond, the said contractors were principals and the complainant was their surety, said bond being in the full penal sum of eleven thousand six hundred and twenty-five ($11,625.00) dollars, a copy of which said bond is hereto attached, marked Exhibit "A," hereby referred to, and by such reference made to be a part hereof.

IV.

That said contractors, within a reasonable time after the execution of said contract, entered upon the performance of the same and incurred in the purchase of materials and in the employment of labor, many obligations in large sums, and the said contractors are now indebted to persons supplying and furnishing to them labor and materials in the prosecution of the said work, in the sum of about twenty thousand dollars, all of which indebtedness is long over due. That the said contractors have not kept and performed the terms of the said contract, in that they have not promptly made full
7 payment to all persons supplying and furnishing to them labor and materials in the prosecution of said work, and that they are in default of the payments of said sums.

V.

That it is provided in said contract that the United States shall reserve and withhold from said contractors ten per cent. of the total contract price for said buildings until the said work was fully completed and accepted by the United States, and that there is now in the hands of the United States the sum of about fourteen thousand ($14,000.00) dollars, which is a part of said contract price and which is justly applicable to the payment of the obligations incurred by the said contractors in the performance of said contract.

VI.

That some time subsequent to the execution by the complainant of said bond, and at a date unknown to the complainant, the said defendants, Henningsen and Clive, contrary to the statute of the United States in that behalf provided, made, executed and delivered to

the defendant, the National Bank of Commerce, or to the defendant, R. R. Spencer, as a trust and for the benefit of said bank, a pretended written assignment of all moneys due, or which might thereafter become due from the United States to the said contractors under and by virtue of the terms of the said contract. That as the complainant is informed and believes, and upon this information and belief alleges the fact to be, the said pretended assignment was made for the purpose of securing the payment to the said bank of some money obligation of the defendant, Henningsen, personally to said bank which said personal obligation has no relation to, or connection with the business of the said contractors as copartners and has no connection with, or relation to the said contract, but is a personal obligation of the said Henningsen of long standing, the validity and merits of which are unknown to complainant.

8

VII.

That by some arrangement entered into by the said contractors, the defendant Clive is now taking no active part in the performance of said contract, or in the transaction of business relating thereto, and the defendant Henningsen has sole supervision and direction of the matters pertaining thereto, including the receipt of all checks and moneys due from the United States to the said firm on account of said contract, or any matters relating thereto. That the complainant is unable to state whether said copartnership has been dissolved, and does not know whether the payment, which is about to be made of the balance due under said contract, will be made to the said defendants, Henningsen and Clive, or to the defendant Henningsen, alone. That as the complainant is informed and believes, and upon its information and belief alleges the fact to be, the defendant Henningsen, or the defendants Henningsen and Clive, has or have agreed with the said bank that immediately upon receipt from the Quartermaster of the United States, stationed at Seattle, of the balance due under said contract, to wit, said sum of about fourteen thousand dollars, he, or they, will at once pay the said money to the said bank, or to the said Spencer for the said bank, and that in case said payment is made by check, he, or they, will at once indorse said check to and deliver the same to the said bank, or the said Spencer. That if the said money is paid to the said Henningsen & Clive, or the said Henningsen, he, or they, will at once deliver the said money either in kind by the indorsement or delivery of the check of the said Quartermaster for the said money to the said bank, or the said Spencer and the same will be at once applied by the said bank, or the said Spencer, to the payment of the said personal indebtedness of the said Henningsen, and the same will be wholly lost to the creditors of the said Henningsen and Clive who have furnished labor and materials in the performance of said contract, and to the complainant surety of said contractors. That the defendants, Henningsen and Clive, are, and each of them is, wholly insolvent,

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and they have not, and neither of them has, any property whatsoever subject to execution, or out of which the said creditors, or the complainant can realize any sum or sums whatsoever, save and except the balance due upon said contract.

VIII.

That for the purpose of protecting its rights upon the premises and the rights of said creditors, the complainant has heretofore filed with the Secretary of War of the United States, its written and sworn petition setting out all the facts hereinabove set
10 out, and praying that the said Secretary of War will disregard and instruct the subordinate officers of said Department and the Quartermaster's Department of the United States to disregard the assignment hereinabove referred to, and praying the said Secretary to cause the sums due or to become due the said contractors on account of said contract, to be applied to the payment of the indebtedness of the said contractors for labor and materials furnished for and used in the performance of said contract. That the complainant is informed, and upon information and belief alleges the fact to be, that notwithstanding such petition the Quartermaster of the United States Army, stationed at Seattle, will, at ten o'clock on the morning of June 9th, 1904, pay to the said contractors the full amount due on said contract, to wit, the sum of about fourteen thousand dollars. That if said balance is so paid to the said contractors, or either of them, they will, unless restrained by the order of this court, forthwith pay the same to the said bank, or the said Spencer, in payment of the said personal indebtedness of the said Henningsen, and the same will be wholly lost to the complainant, and to the said creditors of said contractors, and the complainant will be compelled to pay to the said creditors the full amount specified in said bond and will be unable to recover any part thereof from the said contractors; whereas, if the same be paid to the aforesaid creditors of the said contractors who have furnished such labor and supplies, the complainant will be compelled to pay, under its said bond to
11 the creditors of the said contractors, not more than the sum of seven thousand ($7,000) dollars; that owing to the insolvency of the said contractors, the complainant is wholly without any remedy against said contractors except such remedy as can be obtained in the Court of Equity and through the injunctive orders of said court.

Wherefore, the complainant prays:

1. That this court will, by its final decree herein, declare that the assignment above mentioned to the defendant, the National Bank of Commerce, or the defendant, R. R. Spencer, is null and void as against this complainant, and will, by its said decree and by its injunctive order, compel the payment by the defendants Henningsen and Clive of all the moneys to be received by them from the United States under said contract, to the creditors of said defendants who have furnished labor and materials for the construction of said buildings.

2. That pending the final determination of this cause this court will, by its order enjoining the defendants, and each and all or any of them, from receiving from the United States or from any official of the United States, any money on account of or in full payment of any balance due on the contract hereinabove mentioned, and will, by its order, enjoin the defendants, the National Bank of Commerce and R. R. Spencer, from receiving from the said Henningsen and Clive, or either of them, any money or check received by the said Henningsen and Clive, or either of them from the United States, or any officer thereof on account of, or in full payment of any balance due under said contract, and will,
12 by its mandatory order, require and compel the defendants, and each of them, to permit the full balance now due to the said Henningsen and Clive, or either of them, from the United States under said contract, to remain in the possession of the United States and its official representatives, pending the final determination of this cause.

3. That pending a hearing upon the application of the complainant for an injunction *pendente lite*, the court will, by its temporary restraining order, restrain the defendants, and each and all of them, from receiving from the United States, or from any officer or official representative thereof, and particularly from the Quartermaster of the United States Army stationed at Seattle, Washington, any sum of money whatever, or any check, or other order or warrant, for the payment of any sum of money whatever due from the United States to the said Henningsen and Clive, or either of them, on account of said contract, and restraining the defendants, the National Bank of Commerce and R. R. Spencer, from receiving from the said Henningsen and Clive, or either of them, any sum of money whatever, or any check, warrant or other order, for the payment of any sum of money whatever due from the United States to the said Henningsen and Clive, or either of them, on account of said contract, and will by its temporary mandatory order compel the defendants, and each and all of them to permit all moneys due or to become due from the United States to the said Henningsen and Clive, or either of them, to remain
13 in the possession of the United States, or its official representatives, pending the further order of this Court.

4. That complainant have such other and further relief by subrogation or otherwise, as it is in equity entitled to have, and that it recover its costs and disbursements from the defendants herein.

5. That the defendants, and each of them, be required to answer this bill of complainant, but not under oath, answer under oath being expressly waived.

CARR & PRESTON,
Solicitors and Attorneys for Complainant.

EXHIBIT "A."

Contractor's Bond (Public Works).

Know all men by these presents, that we, R. M. Henningsen and Edward W. Clive, copartners doing business under the firm name and style of R. M. Henningsen and Co., of Seattle, Washington, as principal, and The United States Fidelity and Guaranty Co., a corporation existing under the laws of the States of Maryland, as surety, are held and bound unto the United States of America, in the penal sum of eleven thousand six hundred and twenty-five ($11,625.00) dollars, to the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above-bounden R. M. Henningsen and Edward W. Clive, copart-
14 ners as aforesaid, have, on the twelfth day of May, 1903, entered into a contract with the United States, represented by G. S. Bingham, Major and Quartermaster, United States Army, at Seattle Washington, for the construction, complete, at Fort Lawton, Washington, of four (4) certain buildings.

Now, therefore, if the above-bounden R. M. Henningsen and Edward W. Clive, copartners as aforesaid, their heirs, executors, administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said R. M. Henningsen and Edward W. Clive to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.

In witness whereof, the parties hereto have executed this instrument this 15th day of May, 1903; the name and corporate seal of said surety being hereto affixed and these presents duly signed by its attorney in fact pursuant to a resolution of its board of directors, passed on the 11th day of April, 1898, a copy of the record of which is on file in the War Department.

15 In presence of:

EDWARD G. WOOLT, (As to)
R. M. HENNINGSEN. [SEAL.]

HENRY C. EWING, (As to)
EDWARD W. CLIVE. [SEAL.]

Attest:

NORMAN LEWTON, } (As to Surety),
KARL LIVELY, }

THE UNITED STATES FIDELITY AND GUARANTY CO.,
By J. L. HARTMAN, *Its Attorney in Fact.*

[Corporate Seal of U. S. F. & G. Co.]

DISTRICT OF WASHINGTON. *County of King, ss:*

E. M. Carr, being first duly sworn, upon oath deposes and says: I am one of the solicitors of the complainant, and make this affidavit because the said complainant is a corporation; I have read the above and foregoing complaint, know the contents thereof and believe the same to be true.

E. M. CARR.

Subscribed and sworn to before me this 8th day of June, 1904.

JAMES M. GEPHART,
Notary Public in and for the State of Washington, Residing at Seattle.

16 [Endorsed:] Bill of Complaint. Filed this 8th day of June, 1904. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Title of Court and Cause.]

Temporary Restraining Order.

Upon the reading of the petition of the complainant in the above-entitled cause, and it appearing *prima facie* therefrom that the above-entitled plaintiff is entitled to a restraining order, and that an emergency exists which does not permit of the notice of an application for a restraining order:

It is hereby ordered and adjudged that the above-entitled defendants, Henningsen and Clive, and each of them, their agents and representatives, be and they are and each of them is hereby restrained from applying for or receiving from the United States or any officer thereof, and particularly from the Quartermaster of the United States Army stationed at Seattle, any payment or payments whatsoever, or any money, check, warrant or other order for the payment of any money, on account of their contract for the construction of certain buildings at Fort Lawton, which buildings are referred to and described in the bill of complaint in the above-entitled cause. And the said defendants, Henningsen and Clive, and each of them, and their agents and representatives, are and each of them is hereby enjoined and restrained from using,

17 appropriating, disposing of, or in any manner treating or dealing with any money or moneys or checks which shall have come into their possession, and be yet undisposed of, from the United States, or any officers thereof, for and on account of the said contract; and are restrained and enjoined from disposing of, using or in any manner treating or dealing with any money or moneys or checks, or thing of value, which may hereafter come into their possession, voluntarily or involuntarily upon their part, which shall in anywise apply or can in anywise be credited to their account, or the account of either of them, upon the said contract, or on account of any work done or services rendered by them or either of them in connection therewith.

And it is further ordered, considered and adjudged that the said defendants, R. R. Spencer and the National Bank of Commerce, their agents, representatives or servants, are and each of them is hereby enjoined and restrained from receiving from the United States, or from their said codefendants, or from any of them, or from any person or persons whomsoever, any check, money, voucher, or thing of value which may be given out or issued by the United States, or any officer thereof, which can in any manner be charged to the account of the said Henningsen and Clive, or the account of either of them, on account of their said contract. And the said defendants are and each of them is hereby enjoined and restrained, until further order of this court, from the commission of any acts whatsoever which will in anywise change, reduce or shift the obligation of the United
18 States, or any officer thereof, on account of the performance of the said contract by the said contractors. And the said defendants are and each of them is hereby commanded and enjoined to permit all moneys due or to become due to the said Henningsen and Clive, or either of them, on account of said contract, to remain in the possession of the United States and its officers, unappropriated and undisturbed and in nowise interfered with or dealt with by the defendants, or either of them, pending the further order of this court.

And it is further ordered, considered and adjudged that the said defendants and each of them be and they are hereby ordered to show cause, on the 20th day of June, 1904, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as the Court can consider the matter, at the United States Federal courthouse, at the northeast corner of Fourth Avenue and Marion Street, in the city of Seattle, King County, State of Washington, why a temporary injunction should not issue herein, restraining them from the commission of all acts herein referred to, pending the termination of the above-entitled action in the above-entitled court.

Dated Seattle, King County, Washington, this 8th day of June, A. D., 1904.

C. H. HANFORD, *Judge.*

[Endorsed:] Temporary Restraining Order. Filed this 8th day of June, 1904. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

19 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Northern District of Washington, ss:

I hereby certify and return that I served the annexed temporary restraining order with certified copy of complaint on the therein named R. M. Henningsen, by handing to and leaving a true and correct copy thereof with R. M. Henningsen, personally, at Seattle in said district on the 8th day of June, 1904.

C. B. HOPKINS,
United States Marshal.
By FRED M. LATHE, *Deputy.*

Marshal's Fees.

Service $2.00
Mileage ..... .12

$2.12

Filed in the United States Circuit Court, District of Washington. Jun- 9, 1904. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

UNITED STATES OF AMERICA,
Northern District of Washington, ss:

I hereby certify and return that I served the annexed temporary restraining order with certified copy of compla-nt on the therein named Edward W. Clive, R. R. Spencer, Nat'l Bank of
20 Commerce (by R. R. Spencer, casheir), by handing to and leaving a true and correct copy thereof with each personally at Seattle in said District, on the 9th day of June, 1904.

C. B. HOPKINS,
United States Marshal.
By FRED M. LATHE, *Deputy.*

Marshal's Fees.

Service $6.00

Filed in the United States Circuit Court, District of Washington. Jun- 9, 1904. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

[Title of Court and Cause.]

Demurrer to Bill of Complaint.

The demurrer of R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer to the bill of complaint of United States Fidelity and Guaranty Company of Baltimore, Maryland, complainant, these defendants, by protestation not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, or at all, do demur thereto and for cause of demurrer show: That there is no equity in said bill, and that the said complainant has not in and by its said bill made or stated such
21 a case as does or ought to entitle it to any such *discovery* or relief as is thereby sought and prayed for, from or against these defendants, or any of them.

Wherefore these defendants respectively demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

G. E. DE STEIGUER,
Solicitor for the Defendants.

STATE OF WASHINGTON, *County of King, ss:*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

G. E. DE STEIGUER,
Solicitor for Defendants.

STATE OF WASHINGTON, *County of King, ss:*

R. M. Henningsen, being first duly sworn, deposes and says: That he is one of the defendants named in the foregoing demurrer and verifies said demurrer on behalf of himself and his codefendants; that the foregoing demurrer is not interposed for the purpose of delay.

R. M. HENNINGSEN.

Subscribed and sworn to before me this 11th day of July, 1904.
[NOTARIAL SEAL.] FRANK P. LEWIS,
Notary Public in and for the State of Washington, Residing at Seattle.

22 Received copy of the within demurrer and service admitted this 12th day of July, 1904.

CARR & PRESTON,
Attorneys for Plaintiff.

[Endorsed:] Demurrer. Filed in the United States Circuit Court, District of Washington. July 12, 1904. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

[Title of Court and Cause.]

Order Overruling Demurrer to Bill of Complaint.

Now on this 25th day of July, 1904, this cause comes on to be heard upon defendant's demurrer to the complaint, the Court after hearing argument of respective counsel and being sufficiently advised in the premises, overrules said demurrer.

[Title of Court and Cause.]

Joint and Several Answer.

Of the Defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, a Corporation, and R. R. Spencer, to the Complaint of the Complainant, United States Fidelity and Guaranty Company of Baltimore, Maryland.

These defendants respectively now and at all times hereafter saving to themselves all and in all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the

many errors, uncertainties or imperfections in said complaint
23 contained, for answer thereto, or so much thereof as these defendants are advised it is material or necessary for them to make answer thereto, answering, say:

1. These defendants admit that the defendants, R. M. Henningsen and Edward W. Clive, at the time of the making of the contract with the United States Government referred to in the complaint, became and were joint contractors for the performance of said contract, but deny that they were such copartners or continued to act as such joint contractors at the time of the making of the notes, loans or assignments hereinafter referred to, and aver that before the making of such notes, loans and assignments the said Edward W. Clive had withdrawn from all participation in the performance of said contract, and had agreed with the defendant Henningsen that said defendant Henningsen should thereafter perform the same under his sole supervision and direction and receive all checks and moneys thereafter due or to become due from the United States on account of said contract and the matters relating thereto, and admit that the said R. M. Henningsen and Edward W. Clive at all times in the complaint alleged were and still are citizens and residents of the State of Washington.

2. These defendants further admit that at the times alleged in the complaint the complainant was a corporation doing business under and by virtue of the laws of the State of Maryland and was and now is a citizen of the State of Maryland and that the defendant,
The National Bank of Commerce of Seattle, Washington,
24 during the said times was and still is a corporation organized and existing under and by virtue of the laws of the United States and doing business as a national bank in the State of Washington, and was and now is a citizen and resident of the State of Washington, and that the defendant, R. R. Spencer, during said times was and is the duly elected, qualified and acting cashier of said bank and as such, its cheif managing officer, though not entitled as manager, and was and is during said time a citizen and resident of the State of Washington.

3. Referring to paragraph three of the complaint, these defendants admit that on or about the 12th day of May, 1902, the defendants Henningsen and Clive entered into a contract with the United States for the construction at Fort Lawton, Washington, of four certain buildings described in said contract, and that the said Henningsen and Clive, together with the complainant, did make, execute and deliver to the United States a certain bond, a copy of which is attached to the complaint, marked "Exhibit "A," but deny that said bond was made, executed or delivered upon the consideration set forth in paragraph three of the complaint, or any — thereof, and allege that the consideration upon which said bond was made and delivered upon the part of the complainant was a certain sum or premium then and there paid by the said Henningsen and Clive to the complainant.

4. Referring to paragraph four of the complaint, these defendants

admit that there were at the time set forth various amounts
25 due on account of labor and material employed and furnished in the performance of said contract, amounting in all to about twenty thousand dollars; but deny that the said contract provided for the payment of the persons supplying and furnishing such labor and material, or any of them, of the amounts of their labor and material, or any thereof, and allege that said contract contains no provision whatsoever for the payment of laborers furnishing labor or persons furnishing material in the performance of said contract.

5. Referring to paragraph five of the complaint, these defendants allege that the total amount of the contract price to be paid for the buildings referred to in said contract was the sum only of forty-six thousand five hundred dollars ($46,500.00), and deny that any portion of said contract price, either the portion to be retained in accordance with said contract, or any other part whatsoever, is justly applicable, or applicable at all, to the payment of the obligations incurred by the said contractors in the performance of said contract, or any of them.

6. And further by way of answer to the complaint, and in particular to paragraph six thereof, the respondents say:

That heretofore, before the 10th day of October, 1903, the said Edward W. Clive had disposed of all his interests in the contract referred to in the petition, to his partner, the said R. M. Henningsen, and that the said Clive thereafter took no part in the performance of said contract or in the furnishing of labor or material there-
26 for, and the said Henningsen had the sole supervision and direction, including the furnishing of all money, labor and material incident to the performance of said contract; that on the 10th day of October, 1903, the said Henningsen, for the purpose of enabling him to perform the contract referred to in the petition and of enabling him to secure and pay for labor and material necessary to said performance, borrowed of the defendant, The National Bank of Commerce of Seattle, the sum of thirty-five hundred dollars, giving to said bank his promissory note payable on demand, for the amount of said loan, with interest thereon at the rate of eight per cent. per annum until paid, on which note no payments whatsoever have been made; that at the time of borrowing said money, the said R. M. Henningsen informed and promised said bank, one of the defendants herein, and informed said R. R. Spencer, its cashier, and the one who attended to the making of said loan that he desired said loan for the purpose of enabling him to perform his said contract, and that upon the issuance of his checks, drafts, or pay orders on said contract, he would cause the same to be delivered to the said Spencer for and on behalf of said bank and would cause the money realized therefrom to be paid to the said bank in so far as might be necessary for the purpose of repaying said loan, and that said money was so loaned to the said R. M. Henningsen for the purpose of enabling him to complete his said contract, and that the whole thereof was by him expended for, and was necessary to the performance of such contract, and that said bank loaned said money on
27 the faith and credit of the representations and promises of the said Henningsen as to the repayment of such loan from pay-

ments to be made upon said contract, and upon all his representations and promises hereinbefore set forth.

That thereafter, on or about the 16th day of March, 1904, and for the purpose of confirming his representations and promises hereinbefore set forth, and for the purpose of securing the repayment to said bank of such further sums of money as might be loaned to the said R. M. Henningsen for the purpose of carrying out his contracts for supplying labor and materials, said Henningsen made and delivered to the said R. R. Spencer, in trust for and for the use of said bank, an assignment of all payments then due or which might become thereafter due on account of his said contract referred to in the petition, and further made and delivered to the said Spencer in trust for and for the use of said bank an order addressed to Captain F. A. Grant, United States Quartermaster, at Seattle, Washington, requesting him to deliver checks for any and all balances due on account of said contract to the said R. R. Spencer, which said assignment and which said request were both signed by the said R. M. Henningsen for and as the act of himself, the said R. M. Henningsen, and the said Edward W. Clive, and signed by the said firm name of R. M. Henningsen & Co., which said request was on the 18th day of March, 1904, delivered to the said Captain F. A. Grant, United States Quartermaster at Seattle, Washington, together with
28 a letter from said R. R. Spencer referring thereto and stating that the same was inclosed, which said request of the said R. M. Henningsen & Co. and letter of said Spencer are now on file in the office of the said Quartermaster, and of which, as these respondents believe, due notice has been given to the War Department at Washington, D. C.

That thereafter, on the 2d day of April, 1904, on the faith and credit of said assignment and request hereinbefore set forth, and for the purpose of enabling the said R. M. Henningsen to pay for labor and material to be furnished on said contract, said bank further loaned to the said R. M. Henningsen the sum of one thousand dollars, taking his note therefor, with interest thereon at eight per cent. per annum, from April 2, 1904, payable on demand, on which note no payments whatsoever have been made; that at the time of securing said loan, the said R. M. Henningsen represented to said bank and to said R. R. Spencer, as its cashier, that said money was furnished for the purpose of paying for materials and labor in the performance of said contract, and promised and agreed with said bank that said loan should be repaid from the balance due or to become due to him upon said contract, and said bank made said loan upon the faith and credit of the assignment, request and promise and agreement of the said R. M. Henningsen hereinbefore set forth, and said money so loaned was all actually and necessarily used in the payment of labor and material in the performance of said contract.

That thereafter, upon the 14th day of May, 1904, said
29 bank, upon the faith and credit of said assignment and request, further loaned to the said R. M. Henningsen the sum of three hundred seventy dollars, taking his note for said sum, with interest from May 14, 1904, at the rate of eight per cent. per annum, upon

which note no payments whatsoever have been made, and which said note was payable on demand, and that said money was so loaned upon the faith and credit and in reliance upon the assignment and request of the said Henningsen hereinbefore referred to, and upon the further statement of the said Henningsen made by him at the time of securing said loan, that said money was secured for and would be used in the payment of labor and material for the performance of said contract, upon all of which said representations said *Bank relief* in the making of said loan, and these defendants say that said money was actually necessary and was actually and necessarily used for the payment of labor and material used in the performance of said contract.

These defendants further say that said bank has no other security whatsoever for the repayment of said loan, and that the whole thereof is justly due, owing and unpaid as evidenced by the said notes, all signed by the said R. M. Henningsen, and that all the money advanced upon said loans was necessarily secured by the said Henningsen in order to enable him to complete said contract and that without the same said contract could not have been completed.

These defendants further say that if said sums of money hereinbefore referred to had not been loaned to the said R. M. Hen-
30 ningsen, he would have been unable to complete the performance of his said contract, and that either the same would have been left only partially performed, to the great loss and damage of the United States, or it would have been necessary for the complainant herein to have completed the contract to its own great loss and damage, and that the complainant and the Government of the United States has fully received thereby the benefit of all said loans hereinbefore set out and made by said bank to said R. M. Henningsen; and these defendants further deny that the assignments and orders hereinbefore referred to were contrary to the statutes of the United States, and deny that the debt thereby secured has no connection with the business of the said contract hereinbefore referred to, and deny that the same is of long standing and to the contrary allege that the same is as hereinbefore set forth.

7. Referring to paragraph seven of the complaint, these defendants admit that at the time therein referred to, the defendant Clive was taking no part in the performance of said contract, or in the transaction of business relating thereto, and that the defendant Henningsen had the sole supervision and direction of the matters pertaining thereto, including the receipt of all checks and money due from the United States on account of said contract, or any matters relating thereto. And these defendants allege that prior to the 10th day of October, 1903, the copartnership between the said Henningsen and said Clive had been dissolved, and that the said Henningsen alone proceeded in the performance of said contract ,and had, alone,
31 the right, separate and apart from the said Clive, to receive the contract price, and that at the time of the making of the complaint herein, the said Henningsen was alone to receive the payment of said purchase price, and that it had been agreed by the said Henningsen, that immediately upon the receipt from the Quarter-

master of the balance due upon said contract, to wit, the sum of about fourteen thousand dollars, the same was to be paid to the said Spencer, in so far as necessary to pay the indebtedness owing to said bank as hereinbefore set forth, and that it had been agreed that any check made or issued upon such payment should be at once endorsed and delivered to the said Spencer, and admit that the same, in so far as necessary, was about to be applied upon the indebtedness of the said Henningsen to said bank hereinbefore set forth; but deny that the balance of said money so to be paid upon said contract, beyond what was necessary to the payment of the indebtedness owing to said bank as hereinbefore set forth, was to be diverted from or lost to the creditors who had furnished labor and materials in the performance of said contract, or to the complainant herein, but aver to the contrary that the balance of said money beyond what was necessary to pay the indebtedness owing to said bank was to be applied in the payment of such claims for labor and materials.

8. Referring to paragraph eight of the complaint, these defendants admit the making and filing with the Secretary of War of the petition therein referred to, and admit that notwithstanding said
32 petition, the Quartermaster of the United States at Seattle, Washington, was about, at the time set forth in the complaint, to make full payment to the said R. M. Henningsen of the amount due upon said contract, to wit, of the sum of about fourteen thousand dollars, and that the said R. M. Henningsen, upon receipt of the same was about to pay the same to the said Spencer, and that the said Spencer was about to apply the same, in so far as might be necessary, to the payment of the indebtedness to said bank, but deny that these defendants, and in particular the said Spencer, or the said bank, upon the payment of said money to said Spencer were about to, or intended to, apply any portion thereof, beyond the amount necessary to pay the indebtedness of the said R. M. Henningsen to said bank referred to hereinbefore, to any other purpose than the payment of claims for labor and material arising out of said contract. And these defendants further allege that the Secretary of War and the officials of the War Department, and the officers of the Quartermaster's Department at Seattle, Washington, had all elected and decided to pay the balance upon said purchase price, to wit, the sum of fourteen thousand dollars, to the said R. M. Henningsen.

Wherefore, these defendants pray that said bill of complaint be dismissed, and that these defendants go hence with their costs most wrongfully sustained, and for such other relief and protection of their rights as may be equitable and according to good conscience.

G. E. DE STEIGUER,
Solicitor for the Defendants.

33 Service of within answer and receipt of a copy thereof admitted this 23rd day of Sept., 1904, and signature of defendants waived.

CARR & PRESTON,
Att'y. U. S. F. & G. Co.

[Endorsed:] Filed in the United States Circuit Court, District of Washington, Sept. 23, 1904. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

[Title of Court and Cause.]

Demurrer to Answer.

Now comes the above-named complainant, United States Fidelity and Guaranty Company, of Baltimore, Maryland, and demurs to the first, second, third, fourth, fifth, sixth, seventh and eighth paragraphs of the joint and several answer of the defendants above named filed in this cause, and for grounds of demurrer states the following:

I.

That the said paragraphs of said answer do not state facts sufficient to constitute any defense to the cause of action set forth in complainant's complaint filed in this cause.

II.

That the facts set forth in said paragraphs of said answer are insufficient in law to constitute any defense to complainant's cause of action.

34 Wherefore, complainant prays the judgment of this Court whether it shall make any other or further reply to said answer.

CARR & PRESTON,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
State of Washington, County of King, ss:

I, H. C. Ewing, being first duly sworn according to law, depose that I am the agent and attorney in fact of the United States Fidelity and Guaranty Company of Baltimore, Maryland, the complainant in this suit, and make this verification in behalf of said complainant, because it is a foreign corporation, and has no officer within the State of Washington, and that the foregoing demurrer is not interposed for delay.

HENRY C. EWING.

Sworn to before me and subscribed in my presence this 12th day of October, A. D. 1904.

[NOTARIAL SEAL.] W. M. WILLIAMS,
Notary Public in and for the State of Washington, Residing at Seattle, Washington.

I, E. M. Carr, of counsel for complainant, United States Fidelity and Guaranty Company of Baltimore, Maryland, do hereby certify

that the foregoing demurrer is, in my opinion, well founded in point of law.

Seattle, Washington, October 12th, 1904.

E. M. CARR.

35 Received copy of the within demurrer and service of the same admitted this 12th day of Oct., 1904.

G. E. DE STEIGUER,
Solicitor for Defendants.

[Endorsed.] Demurrer to Answer. Filed this 14th day of Oct., 1904. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Petition in Intervention and Bill in Intervention.

The petition for leave to intervene and the bill of intervention therefor of Sylvester E. Brown, doing business as S. E. Brown & Company of Seattle, Washington, E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, Carstens Packing Company, a corporation, Bryant Lumber and Shingle Mill Company, a corporation organized under the laws of the State of Washington, W. O. Nelson, The C. B. Smith Company, a corporation, and E. E. Caine, exhibited against the United States Fidelity and Guaranty Company of Maryland, complainant, and R. M. Henningsen and Edward Clive, copartners, The National Bank of Commerce, a corporation, and R. R. Spencer, defendants:

S. E. Brown & Company, E. C. McDougall & Company, Carstens Packing Company, a corporation, Bryant Lumber and Shingle Mill Company, a corporation, W. O. Nelson, The C. B. Smith Company, a corporation, and E. E. Caine, bring this, their petition, for leave to intervene, and present this, their bill of intervention,
36 leave thereto being first had, and thereupon the petition shows:

To the Honorable Judge of the Circuit Court of the United States for the District of Washington, Northern Division, Sitting in Equity:

I.

That they and each of them are creditors of the above-named defendants, R. M. Henningsen and Edward W. Clive in the various amounts and in the manner hereinafter more particularly stated. That they are the creditors or some of the creditors referred to in the bill of complaint filed herein by the plaintiff and referred to in the answer filed herein by the defendants.

II.

Your petitioners further represent and show unto your Honor that the said Henningsen and Clive entered into a contract as al-

leged in the complaint herein, with the United States Government, to perform work at Fort Lawton as in said complaint alleged. That the said contract provided, among other things, that the same should not be assigned or transferred. That to secure the faithful performance of said contract, the said Henningsen and Clive made, executed and delivered a bond in the sum of $11,625, upon which bond the complainant herein became surety. That the said bond was duly delivered to the United States, and by its proper officer or agent approved, and thereby became operative and effective. That each of your petitioners herein furnished labor and material
37 which was proper, and did enter into the construction of the work at Fort Lawton provided for under said contract and referred to in the complaint herein, and which constitutes the basis of your petitioners' demands against the defendants Henningsen and Clive or R. M. Henningsen, and the complainant herein, United States Fidelity and Guaranty Company.

III.

Your petitioners further represent and show unto your Honor, that after the filing of the complaint herein, and before the filing of the answer herein by the defendants, the said complainant and the defendants entered into some sort or manner of agreement, the exact terms of which are unknown to your petitioners, wherein and whereby it was agreed that the Quartermaster of the United States Army, located at Seattle, should deliver to the said defendant Henningsen, payable to his order, a voucher or check for the payment of the balance due upon said contract, to wit, the sum of $14,000.00, as alleged in the complaint herein; and that he, the said Henningsen, should at once endorse and deliver the same to the above-named defendant, R. R. Spencer, for the following purposes: That he, the said R. R. Spencer, should reserve out of said fund a sufficient amount to pay to himself or to The National Bank of Commerce, the various sums alleged in defendants' answer to be due to the bank or to R. R. Spencer, as its cashier, from the said defendants Henningsen and Clive or the defendant Henningsen, and that the balance should be distributed among the various creditors of the said Henningsen and Clive, or the said
38 Henningsen, who had supplied labor and material in the execution of the contract referred to, and that the moneys so reserved by the said Spencer should be held by him to await the results of this action.

IV.

Your petitioners further represent and show unto your Honor, that afterwards, the said Quartermaster did make and deliver to said Henningsen a voucher or check payable to the order of the said Henningsen, for the said amount of about $14,000, and that he, the said Henningsen, did deliver the same to the said R. R. Spencer, for the uses and purposes hereinabove set forth. That the said Spencer received the money thereon, and did, out of said fund,

pay to the said creditors certain sums of money upon their respective claims, due them from the said Henningsen and Clive or the said Henningsen, but reserved to himself for the use of himself or for the use of the defendant National Bank of Commerce, a large sum of money, to wit, the sum of $5,500.00, to be so reserved until the determination of this action, and to be disposed of as the Court might determine herein.

V.

Your petitioners further represent and show unto your Honor that there is due to creditors of the said Henningsen and Clive or the said Henningsen, a large amount of money, to wit, about the sum of $16,000, for labor and material supplied for the completion of the contract at Fort Lawton hereinabove referred to, and that the amount so reserved by the said R. R. Spencer is not sufficient to pay them in full.

39 VI.

Your petitioners further represent and show unto your Honor that the complainant herein, the United States Fidelity and Guaranty Company, being the surety upon the bond of the said Henningsen and Clive, as herein alleged, and as in said complaint and answer admitted, are liable to these interveners for all deficit which may be due them after the exhausting of the funds arising out of the contract itself, including the money so reserved by the said R. R. Spencer, if it should be adjudged that the said last mentioned money is available and applicable to the payment of your petitioner's debts.

VII.

Your petitioners further represent and show unto your Honor, that the various claims are as follows, after allowing to the said Henningsen and Clive, or the said Henningsen, the benefit of all credits, deductions and setoffs, the various sums, to wit:

To Sylvester E. Brown, the sum of $2,080.21; and that the same has been reduced to judgment in the Superior Court of the State of Washington, for the County of King, against the said R. M. Henningsen.

To E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, the sum of $1,098.00.

To Bryant Lumber and Shingle Mill Company, a corporation, the sum of $5,321.83.

Carstens Packing Company, a corporation, $80.00.

To W. O. Nelson, the sum of $1,209.40.

40 To The C. B. Smith Company, a corporation, the sum of $2,118.10.

To E. E. Caine, the sum of $128.86.

VIII.

Your petitioners further represent and show unto your Honor, that they are informed and believe, and upon such information and belief aver the fact to be, that the complainant herein, at the time of entering into the execution of said bond, took and exacted of the said Henningsen and Clive and the said Henningsen ample security for any liability which the said complainant might be called upon to meet on account of said bond, and now holds said security, the same being the assets of the said Henningsen and Clive and the said Henningsen, to secure and make whole the said complainant on account of any sums which it might have to pay by reason of said bond.

IX.

Your petitioners further represent and show unto your Honor that the said defendants Henningsen and Clive and each of them are wholly insolvent, and that your petitioners have no adequate remedy at law only in a court having equity jurisdiction where such matters are properly relievable and cognizable.

Wherefore your petitioners pray that the petition of interveners may be filed, and that an order may be made and entered herein, adjudging and decreeing that the money so reserved by the said R. R. Spencer as above alleged, is a proper fund and properly
41 applicable to the payment of your petitioners' said claims, or so much thereof as may be necessary therefor, and that should there not be sufficient of said fund to pay your petitioners in full that then an order may be entered herein, adjudging and decreeing that the said United States Fidelity and Guaranty Company of Maryland is liable for the balance of said deficit (not exceeding the penalty of its said bond), and shall pay the same or so much thereof as may be necessary therefor, not, however, exceeding the penalty in said bond referred to, to wit, $11,625.00.

And your petitioners further pray that a proper allowance may be made herein for all costs by them incurred in and about this petition; for a reasonable attorney's fee herein, and for such other and further relief as to the Court may seem meet and equitable and proper in the premises.

And that an order may be entered requiring the United States Fidelity and Guaranty Company of Baltimore, Maryland, complainant, and defendants, R. M. Henningsen and Edward W. Clive, copartners, The National Bank of Commerce, a corporation, and R. R. Spencer, to enter their appearance to this intervening bill and to answer the same and show cause, if any they have why the prayer of this bill of intervention should not be granted, and that in said order to show cause the said complainant and the said defendants may be cited to appear herein and answer this intervening bill, but not under oath, under oath or affirmation being hereby ex-
42 pressly waived; and that the Court may be pleased to submit to a master for that purpose the taking of testimony, if any be necessary, upon any issues which may be joined upon the answers

hereto, and that the relief hereinbefore prayed for may be granted to interveners.

And your petitioners will ever pray.

S. E. BROWN,
By GEO. A. HAWLEY, *His Att'y,*
BYANT LUMBER AND SHINGLE MILL CO.,
By BALLINGER, RONALD & BATTLE, *Its Att'ys,*
CARSTENS PACKING CO.,
E. C. McDOUGALL & CO.,
By KERR & McCORD, *Their Att'ys,*
W. O. NELSON,
E. E. CAINE,
THE C. B. SMITH CO., A CORP.,
By WM. HICKMAN MOORE,
Their Att'y., Petitioners.

GEO. A. HAWLEY,
BALLINGER, RONALD & BATTLE,
KERR & McCORD,
WM. HICKMAN MOORE,
Attorneys for Petitioners.

43 UNITED STATES OF AMERICA,
District of Washington, ss:

S. E. Brown, being first duly sworn, on oath says: That he is one of the petitioners in the foregoing petition; that he has heard the same read, knows the contents thereof, and believes the same to be true; that he makes this affidavit for himself and on behalf of his copetitioners.

S. E. BROWN.

Subscribed and sworn to before me this 28th day of November, A. D. 1904.

A. J. TENNANT,
Notary Public in and for Washington,
Residing at Seattle.

[Endorsed:] Petition in Intervention. Filed in the United States Circuit Court, District of Washington, Dec. 1, 1904. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

[Title of Court and Cause.]

Order to Show Cause.

Now on this 1st day of December, 1904, there is exhibited to the Court the proposed bill of intervention of Sylvester E. Brown, doing business as S. E. Brown & Company, E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, Bryant Lum-

ber and Shingle Mill Company, a corporation, W. O. Nelson, The C. B. Smith Company, a corporation, Carstens Packing Com-
44 pany, a corporation, and E. E. Caine, against the complainant in this suit, United States Fidelity and Guaranty Company of Baltimore, Maryland, and the defendants thereto, R. M. Henningsen and Edward W. Clive, copartners, The National Bank of Commerce, a corporation, and R. R. Spencer, with the petition praying for leave to intervene under the said bill and file the said bill of intervention as such, and for an order to show cause thereon, and thereupon the Court being fully advised in the premises, it is ordered that the said S. E. Brown & Company, E. C. McDougall & Company, Bryant Lumber and Shingle Mill Company, W. O. Nelson, The C. B. Smith Company, a corporation, Carstens Packing Company, a corporation, and E. E. Caine, have leave to intervene by their said bill, and file the said bill of intervention, and the same being filed—

It is now ordered, that the United States Fidelity and Guaranty Company, complainant, and the said R. M. Henningsen and Edward W. Clive, copartners, The National Bank of Commerce, a corporation, and R. R. Spencer, being served ten (10) days prior to the return day hereof with a copy of the said intervening bill and of this order, whether so served in person or by service upon the solicitors of record of the said parties, show cause on the 21st day of December, 1904, at chambers, at Seattle, Washington, why a decree should not pass herein on the intervening bill as prayed for therein.

It is further ordered that a service of the copy of this order together with a copy of the said intervening bill upon the
45 solicitors of record for the said complainant and the said defendants and each of them shall be a sufficient service hereof to entitle the Court to proceed herein and adjudicate upon the said intervening bill in accordance with the prayer thereof; and the respondents to said bill, if not so served ten days before the return day thereof, shall make showing as now ordered before the expiration of ten days from the date of such service.

Dated this 1st day of December, 1904.

C. H. HANFORD, *Judge.*

[Endorsed:] Order to Show Cause. Filed in the United States Circuit Court, District of Washington. Dec. 1, 1904. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

[Title of Court and Cause.]

Motion to Strike Bill of Intervention.

To the Judge of the Above-entitled Court:

The defendants, in obedience to the order to show cause heretofore, on the 1st day of December, 1904, made herein, hereby enter their appearance to the bill of intervention filed herein on the said 1st day of December, 1904, by E. C. McDougall & Company and the other interveners named in said bill, and respectfully move this Court that the order heretofore on the said 1st day of December, 1904, made

and entered herein, permitting said interveners to file said bill of intervention, be vacated and set aside, and that the said bill
46 of intervention be stricken from the files of this court upon the following grounds:

1st. That the order permitting the filing of said bill of intervention was made *ex parte* and *pro forma*.

2d. That by reason of the fact, as appears upon the face of the said bill of intervention, that the said interveners and each of them are residents and citizens of the State of Washington, and that the defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce, and R. R. Spencer, are each and all residents and citizens of the State of Washington, this court has no jurisdiction to entertain the said bill of intervention.

3d. That it appears upon the face of said bill of intervention that no legal or equitable grounds of intervention exist in favor of the said interveners or any of them.

In the event that the above motion should be denied by the Court, the said defendants further move that the said bill of intervention be dismissed as to the interveners, E. C. McDougall & Company, Carstens Packing Company, W. O. Nelson and E. E. Caine, for the reason that the amount in controversy between each of the said interveners and the complainant and the defendants herein is less than two thousand dollars, and that the amount in controversy between any one of said interveners and the complainant and defendants herein does not exceed the sum of two thousand dollars.

G. E. DE STEIGUER,
Attorney for Defendants.

47 Receipt of a copy and due service hereof admitted this 20th day of December, 1904.

GEO. A. HAWLEY,
BALLINGER, RONALD & BATTLE,
KERR & McCORD,
W. H. MOORE,
Attorneys for Interveners,
By GEO. A. HAWLEY.

[Endorsed:] Motion to Strike Bill of Intervention. Filed in the United States Circuit Court, District of Washington. Dec. 28, 1904. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

[Title of Court and Cause.]

Motion to Strike Bill of Intervention.

To the Judge of the Above-entitled Court:

The complainant, the United States Fidelity and Guaranty Company of Maryland, in obedience to the order to show cause heretofore on the 1st day of December, 1904, made herein, hereby enters its

appearance to the bill of intervention filed herein on the said 1st day of December, 1904, by E. C. McDougall & Company and the other interveners named in said bill, and respectfully moves this court that the order heretofore on the said 1st day of December, 1904, made and entered herein, permitting said interveners to file said bill of intervention, be vacated and set aside, and that the said
48 bill of intervention be stricken from the files of this court upon the following grounds:

1st. That the order permitting the filing of said bill of intervention was made *ex parte* and *pro forma*.

2d. That by reason of the fact, as appears upon the face of the said bill of intervention, that the said interveners and each of them are residents and citizens of the State of Washington, and that the defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce and R. R. Spencer, are each and all residents and citizens of the State of Washington, this Court has no jurisdiction to entertain the said bill of intervention.

3d. That it appears upon the face of said bill of intervention that no legal or equitable grounds of intervention exist in favor of the said interveners or any of them.

In the event that the above motion should be denied by the Court, the said complainant further moves that the said bill of intervention be dismissed as to the interveners, E. C. McDougall & Company, Carstens Packing Company, W. O. Nelson and E. E. Caine, for the reason that the amount in controversy between each of the said interveners and the complainant and defendants herein is less than $2,000.00, and that the amount in controversy between any one of said interveners and the complainant and defendants herein does not exceed the sum of $2,000.00.

CARR & PRESTON,
Solicitors for Complainant.

49 Received copy of the within motion and service of the same admitted this 20th day of Dec., 1904.

BALLINGER, RONALD & BATTLE,
Attorneys for Bryant Lumber & Shingle Co.
KERR & McCORD,
Attorneys for Carstens Packing Co. and E. C. McDougall & Co.
WM. HICKMAN MOORE,
Attorney for W. O. Nelson, E. E. Caine and C. B. Smith Co.
GEO. A. HAWLEY,
Attorney for S. E. Brown.

[Endorsed:] Motion to Strike Bill of Interveners. Filed in the United States Circuit Court, District of Washington. Dec. 31, 1904. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

Order Granting Motion to Strike Bill of Intervention.

This day came on regularly for hearing the motion of the complainant herein and the motion of the defendants herein to strike from the files of this court the bill of intervention of Sylvester E. Brown, doing business as S. E. Brown & Company, E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, Carstens Packing Company, a corporation, Bryant Lumber & Shingle Mill Company, a corporation, W. O. Nelson, The C. B. Smith
50 Company, a corporation, and E. E. Caine; the complainant appearing by its attorneys, Messrs. Carr & Preston, and the defendants appearing by their attorney, G. E. de Steiguer, Esq., and said interveners appearing by their attorneys, George Hawley, Esq., and William Hickman Moore, Esq., and it appearing to the Court from said bill of intervention and upon the face thereof that no legal or equitable grounds of intervention exist in favor of the said interveners, or any of them; and it further appearing to the Court from said bill of intervention that said interveners have not, and none of them has, any lien upon or against or right to the fund which said interveners seek to have paid to them, said fund being a certain amount heretofore paid to The National Bank of Commerce of Seattle, and being a portion of the sum paid upon a contract of the defendants Henningsen and Clive with the United States Government for certain work at Fort Lawton:

Now, therefore, the Court being fully advised, and having jurisdiction in the premises, grants said motion, by reason whereof it is hereby ordered, adjudged and decreed that said bill of intervention be, and the same is hereby, dismissed and stricken from the files of this court.

It is further ordered and adjudged that the complainant recover of and from the interveners, Sylvester E. Brown, doing business as S. E. Brown & Company, E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, Carstens Packing Company, a corporation, Bryant Lumber & Shingle Mill Company, a corporation, W. O. Nelson, The C. B. Smith Company, a
51 corporation, and E. E. Caine, and each of them, the costs of the said intervention to be taxed.

Done in open court this 5th day of January, 1905.

C. H. HANFORD, *Judge*.

[Endorsed:] Order Granting Motion to Strike Bill of Intervention. Filed this 5th day of Jan., 1905. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Title of Court and Cause.]

Amended and Supplemental Bill of Complaint.

To the Honorable Judges of the Above-entitled Court:

The complainant for an amended and supplemental bill of complaint, filed herein by the consent of the defendants, alleges:

I.

That at all times herein mentioned, the defendants R. M. Henningsen and Edward W. Clive were and still are copartners, contracting as such with the Government of the United States for the erection of certain buildings at Fort Lawton, in the State of Washington, and were and now are citizens and residents of the State of Washington.

II.

That all of said times complainant was and now is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Maryland, and was and now is a citizen of the State of Maryland; and the defendant, The National
52 Bank of Commerce, has been and now is a corporation organized and existing under and by virtue of the laws of the United States and doing business as a National Bank in the State of Washington, and was and now is a citizen and resident of the State of Washington; and the defendant, R. R. Spencer, is and at all such times has been its duly elected and qualified and acting manager and cashier, and has been and now is a citizen and resident of the State of Washington.

III.

That on or about the 12th day of May, 1903, the defendants Henningsen and Clive entered into a contract with the United States for the construction, complete, at Fort Lawton, Washington, of four (4) certain buildings fully described in said contract. That a copy of said contract is hereunto attached, marked Exhibit "A," and hereby referred to and by such reference made a part hereof. That upon the execution of the said contract, the said defendants were required to present, with said contract, a bond, conditioned, among other things, for the full completion of the said buildings and for the full payment of the cost of all labor and materials entering into the construction of said buildings, and that the said contractors exhibited the said contract to the complainant and applied to it to execute for them the said bond; and that the complainant, in consideration among other things of the law governing such cases, and especially the provisions of the United States Statutes and of said contract making null and void any assignment or as-
53 signments which said contractors might make of any sums becoming due them under said contract, and of the pro-

visions in said contract for the retention by the United States of twenty per cent. (20%) of the total contract price named in said contract until the full completion and performance by the said contractors of the said contract, consented to become surety for the said contractors, and did under date of May 15th, 1903, make, execute and deliver a bond to the United States, in which bond the said contractors were principals and the complainant was their surety, said bond being in the full penal sum of eleven thousand six hundred and twenty-five dollars ($11,625.00), a copy of which said bond is hereto attached, marked Exhibit "B," hereby referred to and by such reference made a part hereof.

IV.

That said contractors, within a reasonable time after the execution of said contract, entered upon the performance of the same and incurred, in the purchase of materials and in the employment of labor, many obligations in large sums, and the said contractors were, at the time the bill of complaint was filed herein, indebted to persons supplying and furnishing to them labor and materials in the prosecution of the said work, in the sum of more than twenty thousand dollars, and are now so indebted in the sum of more than thirteen thousand dolars, all of which indebtedness is long overdue. That the said contractors have not kept and performed
the terms of the said contract, in that they have not promptly
54 made full payment to all persons supplying and furnishing
to them labor and materials in the prosecution of said work, and that they are in default in the payment of said sums.

V.

That it is provided in said contract that the United States shall reserve and withhold from the said contractors twenty per cent. (20%) of the total contract price for said buildings until the said work was fully completed and accepted by the United States, and that there was, at the time this suit was commenced, in the hands of the United States twenty per cent. of said contract price and other sums due on said contract, in all the sum of about fourteen thousand dollars ($14,000), which was and is a part of said contract price and which was and is justly applicable to the payment of the obligations incurred by the said contractors in the performance of said contract.

VI.

That some time subsequent to the execution by the complainant of said bond, and at a date unknown to complainant, the said defendants Henningsen and Clive, contrary to the statute of the United States in that behalf provided, and contrary to the provisions of said contract, made, executed and delivered to the defendant, The National Bank of Commerce or to the defendant R. R. Spencer, as a trustee and for the benefit of said bank, a pretended written assignment of all moneys due or which might

thereafter become due from the United States to the said
55 contractors under and by virtue of the terms of the said contract. That as the complainant is informed and believes, and upon such information and belief alleges the fact to be, the said pretended assignment was made for the purpose of securing the payment to the said bank of some money obligation of the defendant Henningsen personally to said bank, which said personal obligation had no relation to or connection with the business of the said contractors as copartners, and had no connection with or relation to the said contract, but is a personal obligation of the said Henningsen of long standing, the validity and merits of which are unknown to complainant.

VII.

That by some arrangement entered into by the said contractors, the defendant Clive is now taking no active part in the performance of said contract, or in the transaction of business relating thereto, and the defendant Henningsen has, and has had, sole supervision and direction of the matters pertaining thereto, including the receipt of all checks and moneys due from the United States to the said firm on account of said contract, or any matters relating thereto. That the complainant is unable to state whether said copartnership has been dissolved, and at the time this suit was begun did not know whether the payment which was about to be made, of the balance due under said contract, would be made to the said defendants Henningsen and Clive or to the defendant Henningsen alone. That as the complainant was informed and believed, and upon such information and belief alleged the fact to be, the
56 defendant Henningsen or the defendants Henningsen and Clive had agreed with the said bank that immediately upon the receipt from the Quartermaster of the United States, stationed at Seattle, of the balance due under said contract, to wit, said sum of about fourteen thousand dollars, he or they would at once pay the said money to the said bank, or to the said Spencer for the said bank, and that in case said payment was made by check, he or they would at once indorse said check to and delivered the same to the said bank or to the said Spencer, and that if the said money was paid to the said Henningsen and Clive or the said Henningsen, he or they would at once deliver the said money, either in kind or by the indorsement or delivery of the check of th- said Quartermaster for the said money, to the said bank or to the said Spencer, and the same would be at once applied by the said bank or the said Spencer to the payment of the said personal indebtedness of the said Henningsen, and the same would be wholly lost to the creditors of the said Henningsen and Clive who had furnished labor and materials in the performance of said contract, and to the complainant surety of said contractors, and that the defendants Henningsen and Clive were and each of them was wholly insolvent, and they have not and neither of them had any property whatsoever subject to execution, or out of which the said creditors or

the complainant could realize any sum or sums whatsoever, except and save the balance due upon said contract.

57 VIII.

That after the commencement of this suit, and after service of process herein upon the defendants, and after the issuance of the restraining order issued by this Honorable Court upon the filing of the original bill of complaint herein, restraining the defendants Henningsen and Clive from receiving from the Quartermaster of the United States the moneys hereinabove referred to, and restraining the defendants, The National Bank of Commerce and R. R. Spencer, from receiving said money or any part thereof from the said defendants Henningsen and Clive, all of the parties hereto entered into a stipulation in writing regarding the rights of the respective parties hereto and regarding the disposition of the moneys hereinbefore referred to, a full, true and correct copy of which stipulation is hereunto attached, marked Exhibit "C," and hereby referred to and by such reference made a part hereof.

IX.

That upon making the written stipulation hereinabove referred to, the same was executed by the parties thereto, and $8,024.21 of said money was paid to the creditors of the said Henningsen and Clive named in the schedule attached to the said written stipulation, in the amounts specified in said schedule; and the balance of said money, to wit, $5,041.79 was paid to the defendant The National Bank of Commerce, in trust for all of the parties hereto, to await and be subject to the final decree to be rendered herein; and the
58 said money, to wit, the sum of $5,041.79 is still retained and held by the said defendant in trust as aforesaid.

X.

The complainant further alleges that it is informed and believes, and upon its information and belief alleges, that the defendants and each of them claim and will claim and allege that the assignment hereinabove complained of, from the defendant Henningsen to the defendant National Bank of Commerce, or the defendant R. R. Spencer, was made for the purpose of securing the payment of a loan of loans made by the said defendant bank to the said Henningsen, and that the money or moneys loaned by the said bank to the said Henningsen were loaned to the said Henningsen to enable him to carry on and complete the contract above referred to, and that the whole of the money or moneys so loaned was expended by the said Henningsen for and was necessary to the performance of such contract, and that the same was actually and necessarily used in the payment of labor and material in the performance of said contract, and that if said money or moneys had not been loaned by the said bank to the said Henningsen he would have been unable to complete the

performance of the said contract. And the complainant denies that the said assignment from the said defendant Henningsen to the defendant bank was made for the purpose of securing the payment of a loan or loans of money to be used or which was used to enable the said Henningsen to carry on and complete the said contract; but upon its information and belief alleges the fact to be that
59 the said assignment was made to secure, in large part at least, the payment of loans made by the said bank to the said Henningsen before the execution of the contract hereinbefore referred to; and the complainant denies that the whole of the moneys loaned by the defendant bank to the defendant Henningsen was expended by the defendant Henningsen for the performance of the said contract, and denies that the same was used in the payment of labor or material in the performance of said contract and upon its information and belief alleges the fact to be that the said moneys were, in large part, expended in the payment of the indebtedness of the said Henningsen existing prior to the execution of said contract, and in the payment of the living expenses of the said Henningsen, and in the payment of indebtedness in no wise connected with the performance of said contract; and the complainant denies that any loan or loans made by the defendant bank to the defendant Henningsen in anywise enabled the said Henningsen to complete the performance of said contract.

XI.

The complainant further alleges that since the commencement of this suit the complainant has commenced in this court a suit in equity, being suit number 1205 of this court, in which it is the complainant and in which all of the persons, firms and corporations having claims against the defendant Henningsen or the defendants Henningsen and Clive, the contractors for the erection and
60 construction of the building hereinabove mentioned, and entitled to demand payment from or maintain actions against the complainant upon the bond hereinabove specified, on account of the default of the said contractors, are the defendants. That by reason of the diverse citizenship of the complainant- and each and all of the said defendants, and by reason of the fact that the amount involved in said suit exceeds the sum of $2,000.00, this Court has full and complete jurisdiction of said suit for all purposes. That such proceedings have been had in said suits that all of the said defendants have appeared therein, and the said suit is proceeding regularly to final decree. That in its bill of complaint in said suit, the complainant has admitted its liability to the said defendants, on account of said bond and said default, in the just and full sum of the penalty of said bond, to wit, the sum of $11,625.00 and all proper and lawful costs and expenses; and the complainant has, in its said bill of complaint, tendered itself as ready and willing to pay into the registry of this court the full amount of the penalty of the said bond and all proper and lawful costs and expenses, for distribution amongst the said defendants as their rights shall be established in said suit. That after the payment to the

creditors of the said contractors of the sum of $8,024.21, as hereinabove stated, there remained due and is now due to the creditors of the said contractors, who are entitled to share in the penalty of the said bond, more than $13,000.00, and by reason thereof, and by reason of the further fact that the amount due some of the said creditors is in dispute, and by reason of the further fact that
61 the right of some of the said creditors to share in the penalty of the said bond is in dispute, and by reason of the further fact that suits have been commenced by some of said creditors against the complainant on their demands, it is necessary that the amounts due to each of said creditors and the proportion of the said penalty of said bond which each of said creditors is entitled to receive should be ascertained and determined in said suit before the complainant can safely discharge its obligation under said bond.

Wherefore, the complainant prays, 1st, that the Court will, by its decree herein, declare that the assignment above mentioned to the defendant, The National Bank of Commerce, or the defendant, R. R. Spencer, is null and void against this complainant, and will by its decree declare that the complainant is entitled to receive from the defendant, The National Bank of Commerce the said sum of $5,041.79, held by it in trust as hereinabove alleged, and will decree payment of the said sum of money by the said defendant to the complainant; and that the complainant recover of and from the defendants herein its costs and disbursements herein to be taxed, and have such other and general relief as in justice and equity it is entitled to receive.

2d. That the defendants and each of them be required to answer this amended and supplemental bill of complaint, but not under oath, an answer under oath being expressly waived.

CARR & PRESTON,
Solicitors for Complainant.

62 STATE OF WASHINGTON, *County of King, ss:*

E. M. Carr, being first duly sworn, on oath, deposes and says:

I am one of the solicitors for the complainant, and make this affidavit in behalf of the complainant because the complainant is a foreign corporation; I have read the above and foregoing amended and supplemental complaint, know the contents thereof, and believe the same to be true.

E. M. CARR.

Subscribed and sworn to before me this 14th day of January, A. D. 1905.

[NOTARIAL SEAL.] W. M. WILLIAMS,
Notary Public in and for the State of Washington,
Residing at the City of Seattle, Wash.

EXHIBIT "A."

Construction Blank.

This agreement entered into this twelfth day of May, nineteen hundred and three, between G. S. Bingham, Major and Quartermaster, United States Army, of the first part, and R. M. Henningsen and Edward W. Clive, copartners doing business under the firm name and style of R. M. Henningsen & Co. of Seattle, in the county of King, State of Washington, of the second part, witnesseth, that the said G. S. Bingham, Major and Quartermaster, U. S. Army,
63 for and in behalf of the United States of America, and the said R. H. Henningsen and Edward W. Clive, copartners as aforesaid, do covenant and agree, to and with each other, as follows:

Article 1. That the said parties of the second part shall furnish all the material and labor required and shall construct, complete, at Fort Lawton, Washington, according to the plans and specifications therefor hereto atached and made a part of this agreement, the following named buildings, for which they shall be paid as follows, to wit:

Field Officers' Quarters:

For Construction, Proper	$9,230.07
For Plumbing	770.00
For Steam Heating	1,018.00
For Gas Piping	300.00
Total	$11,318.07

Captains' Quarters:

For Construction, Proper	$12,959.69
For Plumbing	1,350.00
For Steam Heating	1,552.00
For Gas Piping	400.00
Total	$16,261.69

Lieutenants' Quarters:

For Construction, Proper	$10,882.19
For Plumbing	1,020.00
For Steam Heating	1,220.00
For Gas Piping	325.00
Total	$13,447.19

64 Non-commissioned Officers' Quarters:

For Construction, Proper	$4,798.05
For Plumbing	475.00
For Gas Piping	200.00
	$5,473.05
Grand total sum of	$46,500.00

Article 2. That work on this contract shall commence on or before the twelfth day of May, nineteen hundred and three, shall be carried forward with reasonable dispatch, and be completed on or before the twelfth day of January, nineteen hundred and four.

Article 3. That for and in consideration of the faithful performance of the stipulations of this agreement the parties of the second part shall be paid, at the office of the Constructing Quartermaster, U. S. Army, at Seattle, Washington, as stated in article 1 of this agreement—the total sum of forty-six thousand, five hundred dollars ($46,500.00).

Payments to be made at such times and in such amounts as the officer in charge of the work may elect, based upon estimates to be made by him of completed work; and in all payments twenty (20) per centum of each to be retained until the final completion and acceptance by the Government of the work under contract.

Article 4. That in case of failure of the said parties of the second part to comply with the stipulations of this contract, according
65 to the true intent and meaning thereof, then the party of the first part shall have the power to complete the work at the expense of the parties of the second part in such manner as the party of the first part shall deem best for the interests of the public service, either by day's labor and open market purchase of the necessary material, or by contract, or both and any excess of cost resulting from such failure shall be charged to the parties of the second part.

Article 5. That neither this contract nor any interest therein shall be transferred by the said R. M. Henningsen and Edward W. Clive, copartners as aforesaid to any other party or parties, and any such transfer shall cause the annulment of the contract so far as the United States is concerned; all rights of action, however, for any breach of this contract by the said R. M. Henningsen and Edward W. Clive, copartners as aforesaid—are reserved to the United States.

Article 6. That no member of or delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

Article 7. That this contract shall be subject to the approval of the Quartermaster General U. S. Army.

In witness whereof, the undersigned have hereunto placed their hands, the date first hereinbefore written.

Witnesses:

FRANK W. GOODHUE, As to
G. S. BINGHAM,
Major and Quartermaster, U. S. Army.

EDWARD G. WORTH, As to
66 R. M. HENNINGSEN,

FRANK M. HAWKES, As to
EDWARD W. CLIVE,
Copartners Doing Business Under the Firm Name and Style of R. M. Henningsen & Co.

(Executed in Quintuplicate.)

EXHIBIT "B."

Contractor's Bond (Public Works).

Know all men by these presents, that we, R. M. Henningsen and Edward W. Clive, copartners doing business under the firm name and style of R. M. Henningsen & Co. of Seattle, Washington, as principals, and The United States Fidelity and Guaranty Co., a corporation, existing under the laws of the State of Maryland, as surety, are held and bound unto the United States of America in the penal sum of eleven thousand six hundred and twenty-five ($11,625.00) dollars, to the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above bounded R. M. Henningsen and Edward W. Clive, copartners as aforesaid, have, on the twelfth day of May, 1903, entered into a contract with the United States, represented by G. S. Bingham, Major and Quartermaster, U. S. Army, at Seattle, Washington, for the construction, complete, at Fort Lawton, Washington, of four (4) certain buildings.

67 Now, therefore, if the above-bounden R. M. Henningsen and Edward W. Clive, copartners as aforesaid, their heirs, executors, administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract, agreed and covenanted by said R. M. Henningsen and Edward W. Clive, to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying labor or materials in the possession of the work provided for in said contract, then the above obligation shall be void, and of no effect; otherwise to remain in full force and virtue.

In witness whereof, the parties hereto have executed this instrument this 15th day of May, 1903; the name and corporate seal of said surety being hereto affixed and these presents duly signed by its attorney in fact pursuant to a resolution of its board of directors, passed on the 11th day of April, 1898, a copy of the record of which is on file in the War Department.

In presence of:

EDWARD G. WOOLT, (As to)
R. M. HENNINGSEN. [SEAL.]

HENRY C. EWING, (As to)
EDWARD W. CLIVE. [SEAL.]

68 Attest:

NORMAN LEWTON, } (As to Surety),
KARL LIVELY }

THE UNITED STATES FIDELITY AND GUARANTY CO.,
By J. L. HARTMAN, *Its Attorney in Fact.*

[Corporate Seal of U. S. F. & G. Co.]

EXHIBIT "C."

This agreement made and entered into this 17th day of June, 1904, between R. M. Henningsen and Edward W. Clive, the parties of the first part, The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, the parties of the second part, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, the party of the third part.

Witnesseth: That whereas the parties of the first part heretofore, as copartners, entered into a contract with the Government of the United States for the erection of certain buildings at Fort Lawton in King County, State of Washington; and whereas the party of the third part claims that the parties of the first part as principals, and the party of the third part as Surety, made and delivered to the United States of America, a certain bond conditioned, among other things, for the performance of said contract and the payment of persons supplying labor and materials in the prosecution of the work provided for in said contract; and

69 Whereas, the said work provided for in said contract has been completed and the Government of the United States, through its representatives, is ready to pay to the parties of the first part the balance due on said contract, to wit, the sum of thirteen thousand and sixty-six dollars; and any payments hereafter made on said contract;

And whereas the parties of the second part claim that said money should be paid and the check for the same should be endorsed and delivered to the said R. R. Spencer for the purpose, in so far as may be necessary, of paying certain indebtedness, amounting to the sum of forty-eight hundred seventy dollars, with interest thereon, owing to The National Bank of Commerce of Seattle; and

Whereas, the party of the third part claims that it is entitled that said money should be paid and said check endorsed to it on account of certain rights arising from said bond, and in particular through its alleged right to be subrogated to the rights of the United States, and certain persons on account of certain claims alleged to be unpaid for work and material furnished in the performance of said contract, or claim that it is entitled that said money should be paid and said check endorsed to it on behalf of -ther persons making such claims; and

Whereas, the party of the third part has filed a bill in equity in the United States Circuit Court for the District of Washington, Northern Division, against the parties of the first part and the parties

70 of the second part, seeking to have the claim of the party of the third part as aforesaid established, and has secured a certain emergency order therein against the parties of the first and second parts;

Now, therefore, the parties hereto have agreed and do hereby agree as follows, to wit:

That said sum of thirteen thousand sixty six dollars and any payments hereafter made on said contract be paid and said check endorsed and delivered to the said R. R. Spencer, and that said sum

of money be distributed as follows, to wit: That the sum of five thousand and forty-one 79/100 dollars be applied in conditional payment and satisfaction of three certain notes made and delivered by R. M. Henningsen to The National Bank of Commerce of Seattle, and being dated and in the amounts respectively as follows:

One note for thirty-five hundred dollars, dated October 10, 1903, bearing interest from its date at the rate of eight per cent per annum;

One note for one thousand dollars, dated April 2, 1904, and bearing interest from its date at the rate of eight per cent per annum;

One note for three hundred seventy dollars, dated May 14, 1904, and bearing interest from its date at the rate of eight per cent per annum;

That the balance of said money, to wit, the sum of eight thousand twenty-four and 21/100 dollars, and such further amounts as may be paid on said contract to said Spencer be paid to persons having claims for labor and material performed upon and furnished in the performance of said contract, such payments to be made
71 to them in the amounts specified in the schedule hereto annexed marked Exhibit "A," and made a part hereof.

That in case it be finally determined by appropriate litigation that the party of the third part was entitled to receive the money so hereinbefore provided to be paid upon the claim of The National Bank of Commerce of Seattle, or to have said amount devoted to the payment of claims for labor and material upon said contract, then said, The National Bank of Commerce of Seattle is to pay said sum of money last referred to, by it received, either to the party of the third part, or such other parties as may be determined by the final judgment or decree of the Court, and in such case the conditional payment of the claim of The National Bank of Commerce of Seattle shall be of no further force or effect, but said claim shall exist as a valid and subsisting obligation against the said R. M. Henningsen, notwithstanding such conditional payment, and pending such final determination, said bank shall retain said notes. Such payment of said sum of money and such endorsement of said check to the said R. R. Spencer and such conditional payment of said claim of The National Bank of Commerce of Seattle shall not be construed as a waiver of any claim which the party of the third part might otherwise have upon said fund, either through itself or on account of any subrogation to which it might be entitled as to rights of persons having claims for labor and material performed and furnished for said contract, or to the rights of the United States, but such
72 claim, if any, shall be and continue to the same effect, and with the same rights and remedies and subject to the same conditions and limitations as if these presents had not been executed, and such payment and endorsement had not been made; and the payment of the balance of said money, after the payment of the claims of said bank, to the persons furnishing labor and material, shall not affect nor be construed as affecting any of the rights of the parties of the second part, or either of them to said fund, nor as limiting and diminishing the rights of either of the parties of the

second part thereto, all of which rights shall continue with the same remedies and subject to the same conditions and limitations as if these presents had not been executed, and said payment and endorsement had not been made, it being the intention of these presents to provide a temporary method for the disposition of said fund, leaving the rights of all parties hereto, and the rights of such creditors with regard to the same *in statu quo*, including the rights of the parties of the first part in so far as the parties of the second part may claim thereunder, and with such force and effect as that the rights of the parties of the second part and of the third part shall continue as if said fund was still in the hands of the representatives of the Government of the United States to be paid as the rights of the parties might require in case these presents had not been executed nor acted upon;

That the party of the third part may prosecute the said
73 action brought by it in the Circuit Court of the District of Washington, or such further action as it may bring in said court, all the parties herto conceding and agreeing to hereafter concede that said Circuit Court has the same jurisdiction of said action as if the same had been brought by the party of the third part in the United States Court of Claims, and agreeing to raise no objection to such jurisdiction of said Court to render a decree in said action upon the merits, provided that this stipulation shall not prevent the parties of the second part or third part herein, or any of them, from raising the question that neither the Court of Claims nor any other court has the right or the jurisdiction to grant the relief asked by the party of the third part, or any relief whatsoever.

It is further agreed that the foregoing stipulation as to the jurisdiction of the Circuit Court shall not prevent any of the parties thereto from appealing or applying for a writ of certiorari or asserting any other appellate right to the same extent as might be done in any other case brought in said Circuit Court, save and except that no objection to the jurisdiction of said court shall be raised either upon appeal, or in any other manner, which could not be raised if said action had been brought by the party of the third part in the Court of Claims, should it appear that said action should have been brought in said Court of Claims.

It is further agreed that no objection shall be made to said suit
in the Circuit Court upon the ground of the United States not
74 being a party, but this stipulation shall not be construed as debarring the parties of the first or second part from raising the question that the party of the third part could not in any case maintain this suit for the reason that the United States could not, either in the Circuit Court or the Court of Claims, be made a party and its disposition of the fund could not in any manner be controlled by any court, and if the pending action above referred to prove for any reason or cause not to be proper or appropriate action or proceeding to determine the question in dispute, *i. e.*, whether said fund should go to the second parties or either of them in satisfaction of said notes, or should be applied to the payment of labor and material claims accrued on said Government contract, then said dispute

may be determined in some other action or proceeding appropriate to the determination thereof, and the right or claim of the second parties to retain said money absolutely, shall be in abeyance until said dispute is finally determined on the merits, or until it has been determined that neither the said Circuit Court nor Court of Claims, nor any court of the State of Washington has jurisdiction of the matter.

It is further agreed that if it be determined that said Circuit Court has no jurisdiction of such action for the reason that the same should have been brought in the Court Claims, this stipulation shall not prevent the party of the third part from instituting another action.

In witness whereof the parties hereto have hereunto set
75 their hands and seals the day and year first above written.

R. M. HENNINGSEN & CO.,
By R. M. HENNINGSEN.
NATIONAL BANK OF COMMERCE, SEATTLE, WASH.,
By R. R. SPENCER, *Cashier.*
R. R. SPENCER.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By CARR & PRESTON, *Its Att'ys.*

SCHEDULE.

List of persons and corporations making claim on account of labor and material furnished for the contract of R. M. Henningsen and Company with the United States Government for work at Fort Lawton.

Name.	Amount to be Paid.
Bryant Lumber and Shingle Mill Co	$2,234.00
S. E. Brown & Co	927.69
W. O. Nelson	445.71
James B. Clow and Sons	618.84
W. H. Hunter	222.39
E. C. McDougall & Co	884.59
C. B. Smith Co., Inc	970.29
F. T. Crowe & Co	107.69
Pacific Clipper Line	58.34
Denny Clay Co	60.34
76 Schwabacher Hardware Co	104.69
Seattle Iron Works	47.97
The A. Hambach Co	7.45
Z. C. Miles & Piper Co	34.09
Westerman Iron Works	75.35
Frederick & Nelson, Inc	43.91
Carstens Bros	46.08
Seattle Market	65.52

Chicago Grocery	16.01
Chesley Tow-boat Co., Inc	93.33
Seattle Window Cleaning Co	16.40
Z. C. Miles & Piper Co	168.00
W. E. Porter, assignee of, or holding orders for payment of labor claims	765.00
	$8,013.68
The payment of which sum and of	5,041.79
To the National Bank of Commerce of Seattle, as per contract, will leave a balance on hand for future distribution of	10.53
	$13,066.00

(EXHIBIT "A.")

Received copy of the within complaint and service of the same admitted this 14th day of Jan., 1905.

G. E. DE STEIGUER,
For Def'ts.

[Endorsed:] Amended and Supplemental Complaint. Filed this 14th day of January, 1905. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

77 [Title of Court and Cause.]

Joint and Several Answer

Of the Defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, a Corporation, and R. R. Spencer, to the Amended and Supplemental Complaint of the Complainant, United States Fidelity and Guaranty Company of Baltimore, Maryland.

These defendants respectively now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties or imperfections in said amended and supplemental complaint contained, for answer thereto, or so much thereof as these defendants are advised it is material or necessary for them to make answer thereto, answering, say:

1. These defendants admit that the defendants, R. M. Henningsen and Edward W. Clive, at the time of the making of the contract with the United States Government referred to in the amended and supplemental complaint, became and were joint contractors for the performance of said contract, but deny that they were such copartners or continued to act as such joint contractors at the time of the making of the notes, loans or assignments hereinafter referred to, and aver that before the making of such notes,

loans and assignments the said Edward W. Clive had withdrawn from all participation in the performance of said contract,
78 and had agreed with the defendant Henningsen that said defendant Henningsen should thereafter perform the same under his sole supervision and direction, and receive all checks and moneys thereafter due, or to become due from the United States on account of said contract, and the matters relating thereto, and admit that the said R. M. Henningsen and Edward W. Clive at all times in the amended and supplemental complaint alleged were and still are citizens and residents of the State of Washington.

2. These defendants further admit that at the times alleged in the amended and supplemental complaint, the complainant was a corporation doing business under and by virtue of the laws of the State of Maryland, and was and now is a citizen of the State of Maryland, and that the defendant, The National Bank of Commerce of Seattle, Washington, during the said times was and still is a corporation, organized and existing under and by virtue of the laws of the United States, and doing business at a national bank in the State of Washington, and was and now is a citizen and resident of the State of Washington, and that the defendant, R. R. Spencer, during said times was and is the duly elected, qualified and acting cashier of said bank and as such, its chief managing officer, though not entitled as manager, and was and is during said time, a citizen and resident of the State of Washington.

3. Referring to paragraph three of the complaint, these defendants admit that on or about the 12th day of May, 1902, the
79 defendants Henningsen and Clive entered into a contract with the United States for the construction at Fort Lawton, Washington, of four certain buildings described in said contract, of which a copy is attached to said amended and supplemental complaint, and that the said Henningsen and Clive, together with the complainant, did make, execute and deliver to the United States a certain bond, a copy of which is attached to said amended and supplemental complaint, marked Exhibit "B," but deny that said bond was made, executed or delivered upon the considerations set forth in paragraph three of the supplemental and amended complaint, or any thereof, and allege that the considerations upon which said bond was made and delivered upon the part of the complainant was a certain sum or premium then and there paid by the said Henningsen and Clive to the complainant.

4. Referring to paragraph four of the amended and supplemental complaint, these defendants admit that there were at the time of the filing of the complaint herein, various amounts due on account of labor and material employed and furnished in the performance of said contract, amounting in all to about twenty thousand dollars; and admit that a large amount thereof is still unpaid, but as to what said unpaid portion is, these defendants deny any information or knowledge sufficient to form a belief, and deny that the said contract provided for the payment of the persons supplying and furnishing such labor and material, or any of them, of the amounts

of their labor and material, or any thereof, and allege that
80 said contract contains no provision whatsoever for the payment of laborers furnishing labor, or persons furnishing material in the performance of said contract.

5. Referring to paragraph five of the amended and supplemental complaint, these defendants admit that said contract provided for the retention of twenty per cent, of the contract price as therein stated, and admit that at the time this action was commenced there was in the hands of the officials of the United States to be paid upon said contract price, and including said twenty per cent. in all, the sum of about thirteen thousand and sixty-six dollars ($13,066.00), and deny that any more of said contract price remained unpaid, or was in the hands of the United States at said time, or at any time since, and deny that the same, or any thereof, was or is justly applicable, or applicable at all (to the payment of the obligations incurred by said contractors in the performance of said contract, or any of them.

6. And further, by way of answer to the amended and supplemental complaint, and in particular to paragraph six thereof, the respondents say: That heretofore before the 10th day of October, 1903, the said Edward W. Clive had disposed of all his interests in the contract referred to in the petition to his partner the said R. M. Henningsen, and that the said Clive thereafter took no part in the performance of said contract, or in the furnishing of labor or material therefor, and the said Henningsen had the sole supervision and direction, including the furnishing of all money, labor and material incident to the performance of said contract;
81 that on the 10th day of October, 1903, the said Henningsen for the purpose of enabling him to perform the contract referred to in the petition, and of enabling him to secure and pay for labor and materials necessary to said performance, borrowed of the defendant, The National Bank of Commerce of Seattle, the sum of thirty-five hundred dollars, giving to said bank his promissory note, payable on demand, for the amount of said loan, with interest thereon at the rate of eight per cent. per annum until paid, on which note no payments whatsoever have been made; that at the time of borrowing said money, the said R. M. Henningsen informed and promised said bank, one of the defendants herein, and informed said R. R. Spencer, its cashier, and the one who attended to the making of said loan, that he desired said loan for the purpose of enabling him to perform his said contract, and that upon the issuance of his checks, drafts, or pay-orders on said contract, he would cause the same to be delivered to the said Spencer for and on behalf of said bank, and would cause the money realized therefrom to be paid to the said bank in so far as might be necessary for the purpose of repaying said loan, and that said money was so loaned to the said R. M. Henningsen for the purpose of enabling him to complete his said contract, and that the whole thereof was by him expended for, and was necessary to the performance of such contract, and that the said bank loaned said money on the faith and credit of the representations and promises of the said

Henningsen as to the repayment of such loan from payments
82 to be made upon said contract, and upon all his representations and promises hereinbefore set forth.

That thereafter, on or about the 16th day of March, 1904, and for the purpose of confirming his representations and promises hereinbefore set forth, and for the purpose of securing the repayment to said bank of such further sums of money as might be loaned to the said R. M. Henningsen, for the purpose of carrying out his contracts for supplying labor and materials, said Henningsen made and delivered to the said R. R. Spencer, in trust for and for the use of said bank, an assignment of all payments then due, or which might become thereafter due on account of his said contract referred to in the said complaint, and further made and delivered to the said Spencer in trust for and for the use of said bank, an order addressed to Captain F. A. Grant, United States Quartermaster at Seattle, Washington, requesting him to deliver checks for any and all balances due on account of said contract to the said R. R. Spencer, which said assignment and which said request were both signed by the said R. M. Henningsen, for and as the act of himself, the said R. M. Henningsen, and the said Edward W. Clive, and signed by the said firm of R. M. Henningsen & Co., which said request was on the 18th day of March, 1904, delivered to the said Captain F. A. Grant, United States Quartermaster at Seattle, Washington, together with a letter from said R. R. Spencer, referring thereto and stating that the same was inclosed, which said request of the said R. M. Henningsen & Co., and letter of said Spencer are now
83 on file in the office of the said Quartermaster, and of which, as these respondents believe, due notice has been given to the War Deparment at Washington, D. C.

That thereafter, on the 2d day of April, 1904, on the faith and credit of said assignment and request hereinbefore set forth, and for the purpose of enabling the said R. M. Henningsen to pay for labor and material to be furnished on said contract, said bank further loaned to said R. M. Henningsen the sum of one thousand dollars, taking his note therefor, with interest thereon at eight per cent. per annum from April 2, 1904, payable on demand, on which note no payments whatsoever have been made; that at the time of securing said loan, the said R. M. Henningsen, represented to said bank and to said R. R. Spencer, as its cashier, that said money was furnished for the purpose of paying for materials and labor in the performance of said contract, and promised and agreed with said bank that said loan should be repaid from the balance due or to become due to him upon said contract, and said bank made said loan upon the faith and credit of the assignment, request and promise and agreement of the said R. M. Henningsen hereinbefore set forth, and said money so loaned was all actually and necessarily used in the payment of labor and material in the performance of said contract.

That thereafter, upon the 14th day of May, 1904, said bank, upon the faith and credit of said assignment and request, further loaned to the said R. M. Henningsen the sum of three hundred
84 seventy dollars, taking his note for said sum, with interest from May 14th, 1904, at the rate of eight per cent. per annum,

upon which note no payments whatsoever have been made, and which said note was payable on demand, and that said money was so loaned upon the faith and credit and in reliance upon the assignment and request of the said Henningsen hereinbefore referred to, and upon the further statement of the said Henningsen made by him at the time of securing said loan, that said money was secured for and would be used in the payment of labor and material for the performance of said contract, upon all of which said representations said bank relied in the making of said loan, and these defendants further say that said money was actually necessary, and was actually and necessarily used for the payment of labor and material used in the performance of said contract.

These defendants further say that said bank has no other security whatsoever for the repayment of said loan, and that the whole thereof is justly due, owing and unpaid as evidenced by the said notes, all signed by the said R. M. Henningsen, and that all the money advanced upon said loan was necessarily secured by the said Henningsen in order to enable him to complete said contract, and that without the same said contract could not have been completed.

These defendants further say, that if said sums of money hereinbefore referred to had not been loaned to the said R. M. Henningsen, he would have been unable to complete the performance of his contract, and that either the same would have been left only
85 partially performed, to the great loss and damage of the United States, or it would have been necessary for the complainant herein to have completed the contract to its own great loss and damage, and that the complainant and the Government of the United States has fully received thereby the benefit of all said loans hereinbefore set out and made by said bank to said R. M. Henningsen; and these defendants further deny that the assignments and orders hereinbefore referred to were contrary to the statutes of the United States or said contract, and deny that the debt thereby secured has no conection with the business of the said contract hereinbefore referred to, and deny that the same is of long standing, and to the contrary allege that the same is as hereinbefore set forth.

7. Referring to paragraph seven of the amended and supplemental complaint, these defendants admit that at the time therein referred to, the defendant Clive was taking no part in the performance of said contract, or in the transaction of business relating thereto, and that the defendant Henningsen had the sole supervision and direction of the matters pertaining thereto, including the receipt of all checks and money due from the United States on account of said contract, or any matters relating thereto. And these defendants allege that prior to the 10th day of October, 1903, the copartnership between the said Henningsen and said Clive had been dissolved and that the said Henningsen alone proceeded in the performance of said contract, and had, alone, the right, separate and apart from the said
86 Clive, to receive the contract price, and that at the time of the making of the complaint herein, the said Henningsen was alone to receive the payment of said purchase price, and that it had been agreed by the said Henningsen, that immediately upon the

receipt from the quartermaster of the balance due upon said contract, to wit, the sum of about thirteen thousand dollars, the same was to be paid to the said Spencer, in so far as necessary to pay the indebtedness owing to said bank as hereinbefore set forth, and that it had been agreed that any check made or issued upon such payment should be at once endorsed and delivered to the said Spencer, and admit that the same, in so far as necessary, was about to be applied upon the indebtedness of the said Henningsen to said bank hereinbefore set forth; but deny that the balance of said money so to be paid upon said contract, beyond what was necessary to the payment of the indebtedness owing to said bank as hereinbefore set forth, was to be diverted from or lost to the creditors who had furnished labor and materials in the performance of said contract, or to the complainant herein, but aver to the contrary that the balance of said money beyond what was necessary to pay the indebtedness owing to said bank was to be applied in the payment of such claims for labor and materials.

8. Referring to paragraph eight of said amended and supplemental complaint, these defendants admit the same.

9. Referring to paragraph nine of said amended and supplemental complaint, these defendants admit that of the money
87 referred to in said contract or stipulation in writing, a copy of which is attached to said amended and supplemental complaint, marked Exhibit "C," $5,041.79 was paid to The National Bank of Commerce of Seattle, and the balance, $8,024.21 was paid to the creditors named in the schedule attached to said stipulation, and in the amounts therein specified, but deny that the payment to said bank was made, or is retained or held in trust for all of the parties hereto, or any thereof, save and except in so far as the same is subject to said written stipulation, and aver that of said contract price for said buildings the sum of $13,066.00 was paid, and the check therefor endorsed and delivered to the defendant, R. R. Spencer, and of said amount, the sum of $5,041.79 was paid to said bank in conditional payment and satisfaction of the notes referred to in said stipulation, and the sum of $8,024.21 was paid to the creditors named in said schedule, and in the amounts therein specified.

10. Referring to paragraph ten of said amended and supplemental complaint, these defendants say that they have already answered the same hereinbefore in this answer.

11. Referring to paragraph eleven of said amended and supplemental complaint, these defendants deny any knowledge or information sufficient to form a belief, save and except that these defendants admit that the complainant has instituted an action against some or all of the persons having or claiming to have claims
88 as therein set forth for the purposes in said paragraph alleged.

Wherefore, these defendants pray that this suit be dismissed, and that these defendants go hence with their costs most wrongfully sustained, and for such other relief and protection of their rights as may be equitable and according to good conscience.

G. E. DE STEIGUER,
Solicitor for the Defendants.

Service of the within answer by delivery of a copy to the undersigned is hereby acknowledged this 26 day of January, 1905.

CARR & PRESTON,
Attorneys for Pl'ff.

[Endorsed:] Answer to Amended and Supplemental Complaint. Filed in the United States Circuit Court, District of Washington. Jan. 27, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

Replication.

This replicant, United States Fidelity and Guaranty Company of Baltimore, Maryland, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the joint and several answer of the defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, to the amended and supplemental complaint of the complainant, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and each of them, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

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CARR & PRESTON,
Solicitors for Complainant.

Received copy of the within replication to answer and service of the same admitted this 31st day of Jan'y, 1905.

G. E. DE STEIGUER,
Attorney for Defendants.

[Endorsed:] Replication to Answer. Filed this 31st day of January, 1905. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

90 [Title of Court and Cause.]

Deposition of R. R. Spencer.

Deposition on behalf of the defendants taken before me, the undersigned, Eben Smith, United States Master in Chancery, for the District of Washington, in the above-entitled cause, as follows:

On this 2d day of February, A. D. 1905, before me, Eben Smith,

United States Master in Chancery, for the District of Washington, personally appeared General Carr, of Carr & Preston, solicitors for the complainant, and G. E. de Steiguer, solicitor for the defendants, and at the hour of 2 o'clock P. M., by consent, R. R. Spencer, a witness on behalf of said defendants, who appeared by their solicitor, was produced, and by me carefully cautioned and duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to the matters in controversy in such cause, and being by George E. de Steiguer orally examined, testified as follows:

Examination in Chief:

Q. State your name, residence and occupation?

A. R. R. Spencer; Hotel Washington, Seattle; Banker.

Q. What is your connection with the defendant, the National Bank of Commerce of Seattle?

A. I am cashier and manager.

Q. Were you such cashier throughout the period of the transactions of the subject matter of this action?

A. I was.

91 *(Deposition of R. R. Spencer.)*

Q. I show you Defendants' Exhibit "A." Who signed the name "R. M. Henningsen" to that paper?

A. Mr. R. M. Henningsen.

Q. The defendant in this action?

A. Yes, sir.

Q. To whom was that made and delivered?

A. To the National Bank of Commerce or to me as manager of the National Bank of Commerce.

Q. Is the bank still the holder and owner of that paper?

A. It is.

Q. Has anything been paid upon it?

A. Nothing.

Q. I will call your attention to the erased credit upon the back of the note in the words following: "Int. paid to Dec. 31st, 1903," and ask you how that came to be made, and how it came to be erased.

A. It is customary for us to collect, on demand notes, interest for the elapsed period on June 30th and December 31st; at the close of the fiscal half years. Where the interest is not actually paid in, a credit slip to interest account is made, and, ordinarily, a pencil endorsement is made on the note to show that such slip is in the cash. I had previously attended to this matter, but at the time this endorsement was made delegated it to W. H. Wright, and he made an endorsement in ink, just as though the amount had actually been paid. I think, in this instance, Mr. Henningsen came in and gave his note for the interest, which note was never paid, and the sum, purporting to have been received under this endorsement, was never received by the bank in cash.

92 Q. What, if anything, was the consideration for that note?

A. Thirty-five hundred dollars in cash.

Q. I will now show you Defendants' Exhibit "B," and ask you to explain, in the same way, the existence and ownership of that note.

A. It was executed and delivered by R. M. Henningsen to me as manager of The National Bank of Commerce for the sum of one thousand dollars which was cash advanced to him.

Q. Have any payments ever been made upon that note?

A. No.

Q. Does the bank still own it?

A. It does.

Q. I now show you Defendants' Exhibit "C," and ask you who made and delivered that note, to whom and for what?

A. This note was executed and delivered by R. M. Henningsen in person for the sum of three hundred and seventy dollars cash advanced.

Q. Who is the owner of the note now and holder of it?

A. The National Bank of Commerce.

Q. Have there ever been any payments made on that note?

A. None whatever.

Q. At the time you made Mr. Henningsen the first advance, being that for thirty-five hundred dollars, was there any arrangement between you and him as to the securing of payment of that note?

A. There was.

Q. What was that agreement?

93 A. He agreed he would assign and turn over to us the payments received on this contract.

Q. Did Mr. Henningsen make any statement to you as to the purpose for which he wished this money?

Mr. CARR: Objected to as irrelevant and immaterial.

A. Yes; he stated at the time that he was being hampered on his Fort Lawton contract by the fact that the inspector was giving him short estimates and that he would have to have money to carry the contract through; he also stated that there were some little items of debt on the Mary Island contract, the owners of which were bothering him and that he wished to get this money for the purpose of meeting his pay-rolls and making payment on material on the Fort Lawton contract and to liquidate the items mentioned above in the Mary Island contract.

Q. Did he make any explanation to you as to whether the items of debt on the Mary Island contract had anything to do with the prosecution of his work on the Fort Lawton contract?

Mr. CARR: Objected to as irrelevant and immaterial.

A. He said that they were threatening to sue him and that he was afraid it would absolutely prevent him from going ahead with his work, fearing others to whom he was owing money on the Fort Lawton contract would do the same thing.

94 Q. Did he make any statement as to the respective amounts which he expected to use on the different contracts?

Mr. CARR: Objected to as irrelevant and immaterial.

A. He did not.

Q. I now show you Defendants' Exhibit "D" and ask you by whom it was made, to whom it was delivered and for what?

A. It is an assignment made by R. M. Henningsen and Company executed by R. M. Henningsen and delivered to me to secure the advance made and any advances thereafter made for the prosecution of the work on Fort Lawton.

Q. When you say that was the purpose for which it was given, are you stating in substance what R. M. Henningsen told you at the time of its delivery.

A. I am; or rather it was delivered in pursuance of the demand on my part, or the condition on my part, at the time of making his loans.

Q. Did he hand you any other document at that time?

A. Yes; he gave me a letter addressed to U. S. Quartermaster (I think it was Grant) at that time.

Q. I show you Defendants' Exhibit "E" and ask you what relation that had to that transaction.

A. He gave me a signed letter to the U. S. Quartermaster notifying him practically of the assignment and instructing him to
95 deliver, or requesting him to make a delivery to me of any checks drawn in his favor on the Fort Lawton contract.

Q. Is that a copy of that letter?

A. This is a carbon copy of that letter he signed.

Q. Was it signed, and if so, by whom?

A. It was signed "R. M. Henningsen & Co." by R. M. Henningsen, a member of the firm.

Q. What did you do with this last document you refer to, the notice addressed to Captain Grant?

A. That was sent to him either by mail or messenger; I don't now recollect which.

Q. Did you send any letter with it?

A. I sent a letter substantially as follows:

"MARCH 17, 1904.

SIR: Enclosed I hand you request from R. M. Henningsen & Company to deliver to me any further checks that may be issued by you to account of Fort Lawton contract. I have urged Mr. Henningsen to use every effort to have the work completed by the 28th of this month at the latest, and he is doing everything possible to achieve that end.

Very respectfully yours, R. R. SPENCER, *Cas.*"

Q. At the time that Mr. Henningsen got the thousand dollars advanced—the second note—did he state to you for what he wished that money?

96 Mr. CARR: Objected to as irrelevant and immaterial.

A. He did.

Q. What did he say?

A. It was to be used in making payments to laborers and for material purchased for the Fort Lawton contract entirely.

Q. At the time he got the money on the third note for three hundred and seventy dollars, what, if any, statement did he make to you as to the purpose for which he got this money?

A. It was the same as in my preceding answer, but I think went entirely for pay-roll.

Q. State whether you would have made these loans without the security or the assignment or order and agreement as to repayment to which you have testified?

Mr. CARR: Objected to as irrelevant and immaterial.

A. I would not.

Q. Has the bank any other security for the payment of these notes?

A. We have not. In speaking of these notes not having been paid, of course, I am not referring to the conditional payment which is set out in the agreement attached to the amended bill of complaint.

Q. Do you know of your own knowledge what was done with this money or any of it?

A. No; I have no personal knowledge as to how the money was used.

97 Q. Was any of this money applied in payment of former obligations of Henningsen to the bank?

A. Not one dollar.

Q. Do you remember collecting from the Quartermaster certain money and distributing it?

A. I received from the Quartermaster a check drawn by his office for about thirteen thousand dollars through Mr. Henningsen after this suit was commenced.

Q. Did the bank retain part of that money or did you retain part of this money for the bank?

Mr. CARR: Objected to because that is a matter which is fully covered by the stipulation which is a part of the amended bill of complaint.

A. We retained approximately five thousand dollars under the terms of a stipulation between the parties interested in the suit above mentioned.

Q. Did you pay out the balance in accordance with that stipulation?

A. I did.

And on cross-examination by General CARR, of solicitors for the complainant, testified as follows:

Q. You had loaned money to Mr. Henningsen and his partners, who were contractors for the erection of the Mary Island lighthouse?

A. Yes; the bank had.

Q. At the time the thirty-five hundred dollars was loaned to Mr. Henningsen on the note of October 10, 1903, Henningsen and his partners in that Mary Island contract had made a loss on

98 that contract, had they not, or at least had not collected enough money to pay or had not paid their obligations?

A. They had not in total.

Q. They were considerably in debt on that contract, were they not?

A. They were to us.

Q. Well, to others also.

A. I do not think so; they might have owed some little balances on it.

Q. Mr. Henningsen told you he was being threatened with suits on that Mary Island contract.

A. I know that, but I did not consider there was a considerable amount aside from what he owed us.

Q. Did you question him as to the amount of the indebtedness on which he was being threatened with suit?

A. I do not think I did; I don't remember that I did.

Q. Now, when the money was loaned to him in October, April and May on these three notes which are in evidence, was the money paid in each instance or any instance to Mr. Henningsen, or was it in all three instances placed to his credit upon open account in your bank?

A. The thirty-five hundred dollar note was passed to his credit on open account in the bank and by him checked out; the thousand dollar item and the three hundred and seventy dollar item I am not sure about, but think the first was passed to his credit and checked out by him, and that the second was paid in cash, that is the three hundred and seventy dollars.

99 Q. Neither yourself nor any other officer or employee of the defendant bank exercised any supervision or control over his disbursement of any of this money loaned on these notes.

A. We did not. Had we not had confidence in Mr. Henningsen we would not have loaned him the money.

Q. You do not know to what persons, firms and corporations he paid this money or for what purpose or purposes he paid it?

A. Not except by hearsay.

And on redirect examination by Mr. DE STEIGUER, solicitor for the defendants, testified as follows:

Q. Did you have any understanding with Henningsen as to what was to be done with the balance of the money which might be paid to you under this assignment after the satisfaction of the claims of the bank secured by it?

A. During the first conversation had with him he stated that there would be certain bills to pay, and that when this fund came into our hands that a list of indebtedness would be furnished, and that he expected to use the balance or would use the balance in payment of these debts.

Q. When you say the balance, you mean the balance after satisfaction of the bank's claims.

A. Yes, sir.

It is stipulated that no objection on the ground that the evidence is not the best evidence shall be interposed except when the objection is taken on the examination, and that the reading and

100 signing of the testimony is waived.

During the progress of said examination the following

papers were offered by said defendants' solicitor, duly proved and offered in evidence, and were by me received and marked exhibits and are herewith returned, to wit: Defendants' Exhibit "A," Defendants' Exhibit "B," Defendants' Exhibit "C," Defendants' Exhibit "D" and Defendants' Exhibit "E."

That said depositions were by me reduced to writing, the writing and signing of same waived; that the foregoing constitutes all of the proofs so taken before me; that the said exhibits referred to are by me duly certified and herewith returned; that the taking of said proofs occupied a portion of one day and the stenographer's fee for the same is $—.

All of which is respectfully certified.

EBEN SMITH,
As United States Master in Chancery for the District of Washington, Northern Division.

Dated February 6, A. D. 1905.

[Endorsed]: Return of Proofs Taken on Behalf of Defts. Filed in the United States Circuit Court, District of Washington. Feb. 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

101 DEFENDANTS' EXHIBIT "A."

SEATTLE, WASH., *Oct.* 10, 1903. $3,500.

On demand after date without grace I promise to pay to the order of The National Bank of Commerce of Seattle, thirty-five hundred dollars, for value received, with interest from date at the rate of eight per cent. per annum until paid. Principal and interest payable only in U. S. gold coin. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of nonpayment thereof, binds himself thereon as a principal, not as a surety, and promises in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the Court may adjudge reasonable as attorney's fees in such suit.

R. M. HENNINGSEN.

R. R. S.

On back:

16,472 $3500.
R. M. Henningsen.
Demand.
Int. paid to Dec. 31st. 1903.

Def'ts' Exhibit "A." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. Feb. 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

102 DEFENDANTS' EXHIBIT "B."

SEATTLE, WASH., *Apr.* 2, 1904. $1000.

On demand after date without grace I promise to pay to the order of The National Bank of Commerce of Seattle, one thousand dollars, for value received, with interest from date at the rate of eight per cent. per annum until paid. Principal and interest payable only in U. S. gold coin. For value received each and every party signing or endorsing this note hereby *waived* present-, demand, protest and notice of nonpayment thereof, binds himself thereon as a principal, and not as a surety, and promises in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the Court may adjudge reasonable as attorney's fees in such suit.

R. M. HENNINGSEN.

R. R. S.

On back:

17104. 1000

R. M. Henningsen.

D.

Defendants' Exhibit "B." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. February 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

103 DEFENDANTS' EXHIBIT "C."

SEATTLE, WASH., *May* 14, 1904. $370.

On demand after date without grace I promise to pay to the order of The National Bank of Commerce of Seattle, three hundred and seventy dollars, for value received, with interest from date at the rate of eight per cent. per annum until paid, principal and interest payable only in U. S. gold coin. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of nonpayment thereof, binds himself thereon as a principal, and not as a surety, and promises in case suit is instituted to collect the same or any portion thereof to pay such additional sums as the Court may adjudge reasonable as attorney's fees in such suit.

R. M. HENNINGSEN.

R. R. S.

On back:

17253. $370.00.

R. M. Henningsen.

Demand.

Def'ts' Exhibit "C." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. Feb. 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

104 DEFENDANTS' EXHIBIT "D."

H. C. Henry, President.
R. R. Spencer, Cashier.
O. A. Spencer, Asst. Cashier.

The National Bank of Commerce.

Codes:

A. B, C, and A1.
Lieber's.
Bedford McNeill.
Cable Address: "Commerce."

SEATTLE, WASH., *March* 16, '04.

For value received, I hereby assign to R. R. Spencer all payments now due, or that may hereafter become due me, account of my contract with the Government at Fort Lawton.

R. M. HENNINGSEN & CO.

Def'ts' Exhibit "D." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. February 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

105 DEFENDANTS' EXHIBIT "E."

H. C. Henry, President.
R. R. Spencer, Cashier.
O. A. Spencer, Asst. Cashier.

The National Bank of Commerce.

Codes:

A. B, C, and A1.
Lieber's.
Bedford McNeill.
Cable Address: "Commerce."

SEATTLE, WASH., *March* 16, '04.

Captain F. A. Grant, U. S. Quartermaster, Seattle, Washington.

SIR: You will please deliver checks for any and all balance due me, account of Fort Lawson Contract to R. R. Spencer, and this shall be your authority for so doing.

Very respectfully yours,

——— ———.

(Duplicate.)

Defts. Exhibit "E." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. Feb. 6, 1905. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

106 [Title of Court and Cause.]

Order Submitting Cause.

Now on this day this cause comes on for final hearing, the Court after hearing argument of respective counsel, takes said matter under advisement.

[Title of Court and Cause.]

Memorandum Decision on the Merits.

(Filed February 11th, 1905.)

Without delaying the determination of the several controversies herein to the prejudice of the parties, it will be impossible for me to write a decision. I will therefore merely announce my conclusions.

In the main controversy I hold that the contractor made default in the condition of the bond by failing to pay for materials and labor, and by that default the bonding company became absolutely liable for the full amount of the penalty of the bond. To such liability an equitable right attached to have the balance due from the Government on account of the contract applied to the debts of the contractor secured by the bond. The defaulting contractor could not defeat this equitable right by an assignment of the payments to be made by the Government. The bank as assignee occupied no better position than the assignor to resist the application of the payments in reduction of debts secured by the bond. Therefore it will be decreed

107 that the bank pay into the registry of the court the balance of the money which it received under the stipulation and the taxable costs of the litigation made by its controversy.

By the provisions of the statute under which the bond was given and by the terms of the bond itself the obligation of the bond is to pay for all materials and labor furnished and performed in the prosecution of the work contracted for, and I hold that as the contractor conducting a boarding-house for the benefit of workmen employed, and to facilitate the work, provisions supplied and consumed in the boarding-house during the progress of the work are within the intent of the law deemed materials furnished in the prosecution of the work, and the creditors, having claims for said supplies, are entitled to participate in the distribution of the fund.

The statute authorizes a suit in the name of the United States upon the bond by any person or persons supplying labor or materials for his or their use and benefit. I hold that the law contemplates only one action for the benefit of all unpaid creditors, and it does not authorize each and every creditor to maintain a separate action, and it would be contrary to the spirit and purpose of the law to allow any creditor to gain a preference by being the first to sue. The aggregate amount of the contractor's debts being in excess of the penalty of the bond, it was necessary to bring all the creditors before

the Court for the purpose of marshalling the assets. The creditors having failed to unite in instituting suit, with necessary parties, the bonding company for the protection of their rights, as well as
108 its own, necessarily had to file a bill of interpleader, and upon principles of equity the expense of the proceedings to the extent of the taxable costs should be paid out of the moneys which the bonding company is obligated to pay.

I do not find any ground upon which to make a further deduction to pay reasonable attorney's fees. Upon paying into court the full amount of the penalty of the bond, the bonding company will be entitled to be dismissed, absolved from all liabilities upon the bond in suit, and to be paid out of the fund its taxable costs, including an attorney's docket fee of twenty dollars in each of the two cases.

C. H. HANFORD, *Judge.*

[Endorsed:] Memorandum Decision on the Merits. Filed in the United States Circuit Court, District of Washington. Feb. 11, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

Order of Reference.

Upon the joint motion of the complainant and the defendants, it is hereby ordered that this cause be referred to Eben Smith, Esq., Master in Chancery, for the purpose only of taking and reporting to this Court such evidence as the respective parties hereto may offer before him, the time for taking and reporting said testimony
109 being by the consent of all parties herein hereby limited to February 9th, 1905.

Dated Seattle, in the district aforesaid, this 10th day of January, 1905.

C. H. HANFORD, *Judge.*

[Endorsed:] Order of Reference. Filed this 13th day of February, 1905. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This suit having been heretofore referred to Eben Smith, Esquire, Master in Chancery, for the purpose only of taking and reporting to this Court such evidence as should be offered before him by the respective parties hereto, and the taking of such evidence having been closed and reported to this Court, the parties hereto appeared in open court by their respective attorneys on the 7th day of February, 1905, and stipulated in open court that the cause should be now submitted to the Court for final decision upon the original bill of complaint and answer thereto, and upon the amended and supplemental bill of complaint and answer thereto, and the replication to said answer on

file herein; and upon the said evidence so taken and reported by said master, and upon the oral arguments and written briefs then submitted to the Court. Whereupon, upon said stipulation, it
110 was ordered that the said cause be so submitted.

And the Court having considered the pleadings herein, and the said evidence, and the arguments and briefs of the respective counsel herein, and being fully advised in the premises, now makes its findings of fact and conclusions of law as follows:

Findings of Fact.

I.

That at all times mentioned in the pleadings herein, the complainant was and now is a citizen of the State of Maryland, and each and all of the defendants herein were and now are citizens of the State of Washington.

II.

That heretofore, on, to wit, the 15th day of May, 1903, the defendants, R. M. Henningsen and Edward W. Clive, being then copartners, entered into a contract in writing with G. S. Bingham, Major and Quartermaster, U. S. Army, representing the Government of the United States, for the erection and construction of certain buildings at Fort Lawton, in the State of Washington, of which said contract a full, true and correct copy is attached to the amended and supplemental bill of complaint herein. That thereafter, at the request of the said defendants, and in accordance with the requirements of the Government of the United States, the said defendants, R. M. Henningsen and Edward W. Clive, and the complainant herein
111 as surety, executed a bond to the United States of America, and delivered the same to the said Major G. S. Bingham, as its representative, in the penal sum of $11,625.00, conditioned as required by the said contract, and by the Government of the United States of America, that the said R. M. Henningsen and Edward W. Clive would in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements in and by said contract agreed and covenanted by the said R. M. Henningsen and Clive to be observed and performed, and that the said Henningsen and Clive would promptly make full payment to all persons supplying labor or materials in the prosecution of the work provided for in said contract. That the said bond was accepted by the said Major G. S. Bingham, and by the Government of the United States of America, as a compliance by the said Henningsen and Clive with the requirements of said contract regarding the furnishing of such a bond, and upon the delivery and acceptance of said bond the said contract for the erection of said building was awarded to the said Henningsen and Clive, and they thereafter entered upon the performance thereof. That subsequently, and before the making by the said Henningsen of the assignment to the defendant, R. R. Spencer, in trust for and for the use of the defendant National Bank

of Commerce, of Seattle, the said Edward W. Clive, withdrew from all participation in the performance of said contract under an agreement between himself and the said Henningsen.

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III.

That the defendants Henningsen and Clive and the defendant Henningsen, fully performed their said contract so far as the completion of the said building was concerned, but the said Henningsen and Clive, and the said Henningsen failed to pay in full all persons supplying labor or materials in the prosecution of the said work, and failed and refused to pay just and lawful claims for labor and materials furnished for said work, amounting in the aggregate to the sum of $15,409.04, and in that respect and to that extent made default in the terms, conditions and obligations of the bond hereinabove referred to, a full, true and correct copy of which bond is set out in the said amended and supplemental bill of complaint. That after the said defendants had so defaulted, the complainant herein instituted in this court a suit, being suit No. 1252 of the suit numbers of this court, in which it was complainant, and in which the said Henningsen and the said Clive, and each and all of the persons to whom said Henningsen and Clive were indebted for such labor and materials were defendants, and in its bill of complaint in said suit confessed its liability under said bond to the said creditors of the said Henningsen and Clive to the full extent of the penalty of said bond, to wit, in the sum of $11,625.00. That in such suit such proceedings were thereafter had that a judgment and decree has been entered therein adjudging and decreeing the said complainant to be indebted to the said defendants, creditors of the said Henningsen and Clive, in the full sum of $11,625.00, and directing, ad-

113 judging and decreeing payment thereof to the said creditors pro rata in the amounts specified in said judgment and decree, and decreeing that upon the payment of the said creditors of said sums, the liability of the said complainant on its said bond should be fully discharged.

IV.

That subsequent to the execution and delivery of the said contract and the said bond, and after the said Clive had ceased to have any connection with the performance of the said contract, and after the said contract had been in large part executed, the said Henningsen executed and delivered to the defendant, R. R. Spencer, in trust for the defendant National Bank of Commerce of Seattle, the written assignment referred to in the pleadings herein, and the order addressed to the said Major G. S. Bingham, Quartermaster, U. S. Army, directing the payment to the said R. R. Spencer, as such trustee, of all moneys owing from the United States of America to the said Henningsen on account of said contract, which assignment and order are referred to in the pleadings herein. That the said assignment and order were executed and delivered by the said Henningsen for the purpose of securing payment to the said Spencer,

as such trustee, of a loan made by the said bank to the said Henningsen on or about the 10th day of October, 1903, amounting to the sum of $3,500, and subsequent loans as specified in the answers herein. That the moneys and all thereof so loaned by the said bank to the said Henningsen were paid by the said bank di-
114 rectly to the said Henningsen, and by him handled and disbursed without any supervision or control upon the part of the said bank or the said Spencer.

V.

That at the time of the commencement of this suit there was in the hands of the Quartermaster of the United States Army, representing the United States of America, the sum of $13,066, earned by the said Henningsen under said contract, which said sum of money the said quartermaster was then about to pay to the said R. R. Spencer, under said assignment and order. That upon the filing of the original bill of complaint herein, the said Henningsen and the said Spencer and the said bank were temporarily enjoined from receiving the said money from the said quartermaster. That thereafter a written stipulation, a full, true and correct copy whereof is attached to the amended and supplemental bill of complaint herein, was entered into between the complainant and the said Henningsen and the said bank and the said Spencer, regarding the receipt and distribution of said money, and under the terms of said stipulation the sum of $8,024.21 of said money was paid to creditors of the said Henningsen, who had performed labor and furnished materials in the performance of said contract, and the balance of said money, to wit, the sum of $5,041.79, was applied in conditional payment and satisfaction of the indebtedness of the said Henningsen to the said bank, amounting to the sum of $5,041.79, and by the terms of said stipulation it was provided and agreed, amongst other things,
115 that in case it should be finally determined by appropriate litigation that the complainant herein was entitled to receive the said portion of said money, that then the said National Bank of Commerce should pay the same to the complainant.

VI.

That the liability and loss of the complainant upon its said bond, as finally disclosed and established by the decree of this court, hereinabove referred to in the suit No. 1,252, exceeds the said sum of $5,041.79; that the said sum of $5,041.79 is still held and retained by the said bank under the terms and conditions and agreements set out in the said stipulation.

Conclusions of Law.

I.

That the assignment and order made by the defendant Henningsen to the defendant Spencer, as trustee, are, and each of them is,

and always has been, void and of no force or effect whatsoever as against the complainant.

II.

That the complainant, by reason of the obligation and liability assumed and incurred by it upon the execution of the said bond, and by reason of its loss on account of said bond, is, and at all times mentioned in the pleadings herein has been entitled to receive the said sum of $5,041.79, and the complainant is now entitled to a judgment and decree against the defendant National Bank of Commerce of Seattle, for the said sum, and for its costs and disbursements incurred herein.

116 Dated at Seattle, in the district aforesaid, this 13th day of February, A. D. 1905.

C. H. HANFORD, *Judge.*

[Endorsed:] Findings of Fact and Conclusions of Law. Filed this 13th day of February, 1905. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Decree.

This cause having been heretofore submitted to the Court for final decision, and the Court having heretofore made its written findings of fact and conclusions of law herein, now on this 13th day of February, 1905, all of the parties appearing herein in open court, by their respective counsel, the complainant moved for final decree in accordance with said findings and conclusions, which motion, upon due consideration, was granted.

Wherefore, by reason of the law and the facts, it is by the Court here and now ordered, adjudged and decreed as follows:

First. That the assignment heretofore, on, to wit, the 16th day of March, 1904, made and delivered by the defendant, R. M. Henningsen, to the defendant, R. R. Spencer, as trustee, for the defendant National Bank of Commerce of Seattle, which assignment is fully referred to in the pleadings and findings herein, is, and at all times mentioned in the pleadings herein has been, as against the

117 complainant herein, void and of no force or effect whatsoever.

Second. That by reason of the facts set out in the original and amended and supplemental bills of complaint herein, and found and established by the Court from the pleadings and evidence herein, the complainant has, as against the defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, and R. R. Spencer, and each of them, the first and superior lien upon and a right to receive and hold the sum of money amounting to $5,041.79, now held by the defendant, The National Bank of Commerce of Seattle, under the stipulation entered into between the complainant and the said Henningsen and the said bank and the said

Spencer, which stipulation is fully referred to in the pleadings and findings herein.

Third. That the defendant, The National Bank of Commerce of Seattle, forthwith pay into the registry of this court, for the sole use and benefit of the complainant herein, the sum of $5,041.79, and the costs and disbursements of this suit to be taxed, and that upon the payment thereof by the said defendant into the registry of this court, the clerk of this court forthwith pay the same, less the commissions fixed by statute, to the complainant.

Dated at Seattle, in the district aforesaid, this 13th day of February, A. D. 1905.

C. H. HANFORD, *Judge.*

118 [Endorsed:] Decree. Filed this 13th day of February, 1905. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

Certificate Transferring Cause.

UNITED STATES OF AMERICA, *District of Washington, ss:*

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the District of Washington, do hereby certify that the foregoing attached papers constitute the complete record in cause No. 1205, wherein United States Fidelity and Guaranty Company is complainant, and R. M. Henningsen and Edward W. Clive, copartners, The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, are defendants, including all papers filed in said cause, and all orders, judgments, and decrees made and rendered by the Court up to and including the 2d day of March, 1905; and that this record is made up and certified for the purpose of transferring said cause to the United States Circuit Court for the Western District of Washington, pursuant to the seventh section of the act of Congress entitled, "An act to divide Washington into two Judicial Districts," approved the 2d day of March, 1905.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court, this, the 26th day of May, 1905.

[SEAL.] A. REEVES AYRES, *Clerk,*
By H. M. WALTHEW,
Deputy Clerk.

119 [Title of Court and Cause.]

Petition on Appeal.

Now come the defendants, R. M. Henningsen and Edward W. Clive, copartners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, defendants in the above-entitled cause, conceiving themselves aggrieved by the final arder and decree made and entered herein in this action on the 13th day of February, 1905, whereby, among other things, it was ordered and decreed that the defendant, The National Bank of Commerce of Seat-

tle, forthwith pay into the registry of this court for the sole use and benefit of the complainant herein, the sum of five thousand forty-one dollars and seventy-nine cents ($5,041.79), and the costs and disbursements of this suit to be taxed, do hereby appeal from said final order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignments of error which is filed herewith, and prays that this, its petition for said appeal, may be allowed, and that a transcript of the record, proceedings and papers upon which said final order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that an order be made fixing the amount of security to be given and furnished for said appeal.

G. E. DE STEIGUER,
Solicitor for Defendants.

120 The foregoing petition is granted and the appeal allowed upon the giving of a bond or undertaking as required by law in the sum of five hundred dollars.

Dated May 26th, 1905.

C. H. HANFORD,
District Judge, Presiding in said Circuit Court.

[Endorsed:] Petition on Appeal. Filed in the United States Circuit Court, Western District of Washington. May 26, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

Assignment of Errors.

Now come the defendants, by G. E. de Steiguer, their solicitor, and, in connection with their petition on appeal filed herein, from the final order and decree of this court entered herein on the 13th day of February, 1905, say that said final order and decree, together with the findings of fact and conclusions of law upon which the same was based, are erroneous in the following particulars, to wit:

First. Said Court erred in making any findings whatsoever in regard to the commencement or prosecution of, or judgment or decree in, action No. 1252 referred to in said findings.

Second. The Court erred in concluding in its conclusions of law and in decreeing in its final order and decree that the assignment made to the defendant Spencer referred to in the pleadings
121 herein was void, and in declaring the same of no force or effect.

Third. The Court erred in its conclusions of law in concluding, and in its said final order and decree in finding and establishing, that the complainant has, as against these defendants, or any of them, any lien upon or right to receive the sum of five thousand forty-one dollars and seventy-nine cents (5,041.79), held by the defendant, The National Bank of Commerce of Seattle, or any part thereof, and in

concluding that the complainant was entitled to a judgment and decree against said bank for said sum and for complainant's costs and disbursements.

Fourth. The Court erred in said final order and decree in ordering the defendant, The National Bank of Commerce of Seattle, to pay said sum of five thousand forty-one dollars and seventy-nine cents ($5,041.79), or any thereof, or the costs or disbursements of this suit, into the registry of this court, and erred in ordering that the same be paid to the complainant.

Wherefore, these defendants pray that said final order and decree made and entered herein on the 13th day of February, 1905, be reversed, and that said Circuit Court be directed to enter an order and judgment herein denying to the complainant any right to or lien upon said sum of five thousand forty-one dollars and seventy-nine cents ($5,041.79), so held by the defendant, The National Bank of Commerce of Seattle, and finding and declaring that said bank is entitled to retain the same in payment, or partial payment, of
122 its claims set forth in the answer to the amended bill of complaint.

G. E. DE STEIGUER,
Solicitor for Defendants.

[Endorsed:] Assignments of Error. Filed in the United States Circuit Court, Western District of Washington, May 26, 1905. A. Reeves, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

Bond on Appeal.

Know all men by these presents, that we, The National Bank of Commerce of Seattle, as principal, and H. C. Henry and C. J. Smith, as sureties, acknowledge ourselves to be jointly and severally indebted and held and firmly bound unto the above-named complainant and respondent, United States Fidelity and Guaranty Company of Baltimore, Maryland, in the sum of five hundred dollars for the payment of which we jointly and severally bind ourselves and each of us, and each of our heirs, executors, administrators and successors by these presents.

In witness whereof, the said principal has caused its corporate name to be hereunto signed and its corporate seal hereunto affixed, and the said sureties have hereunto set their hands and seals this 26th day of May, 1905.

The condition of this obligation is such that:

Whereas in the above-entitled court and action a final order and decree was rendered in favor of the complainant and against
123 the defendants on the 13th day of February, 1905; and

Whereas, the above-named defendants have taken an appeal from said final order and decree to the United States Circuit Court of Appeals for the Ninth Circuit:

Now, therefore, if the said R. M. Henningsen, Edward W. Clive,

copartners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation shall be void; otherwise it shall remain in full force and virtue.

And we, the said H. C. Henry and C. J. Smith, the sureties abovenamed, do hereby expressly consent and agree that in case of any breach in the conditions of this obligation, the said Circuit Court may, upon notice to us of not less than ten days, proceed summarily in the suit in which said bond is given, to ascertain the amount which we are bound to pay on account of such breach, and render judgment therefor against us or either of us, and award execution therefor.

NATIONAL BANK OF COMMERCE,
SEATTLE, WASH.,
[SEAL.] By H. C. HENRY, *Its President.*
And by R. R. SPENCER,
Its Cashier and Secretary.
H. C. HENRY. [SEAL.]
C. J. SMITH. [SEAL.]

124 STATE OF WASHINGTON, *Western District of Washington, County of King, ss:*

H. C. Henry and C. J. Smith, being each first severally sworn, does each of and concerning himself, depose and say: I am one of the sureties named in and executing the foregoing bond; I am not an attorney or counsellor at law, sheriff, clerk or marshal or officer of any kind whatsoever of any court of the State of Washington, or of any court of the United States, or of any court whatsoever; I am worth the sum of five hundred dollars in property situated within the State of Washington and within the Western District of the State of Washington, over and above all my debts and liabilities and exclusive of property exempt from execution.

H. C. HENRY.
C. J. SMITH.

Subscribed and sworn to before me this 26th day of May, 1905.

[NOTARIAL SEAL.] G. E. DE STEIGUER,
Notary Public in and for the State of Washington, Residing at Seattle.

The foregoing bond is hereby approved this 26th day of May, 1905.

C. H. HANFORD,
Presiding Judge.

125 [Endorsed:] Bond on Appeal. Filed in the United States Circuit Court, Western District of Washington, May 26, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify that the foregoing one hundred and thirty (130) typewritten pages, numbered from 1 to 130, inclusive, to be full, true and correct copies of all the files, records and proceedings in the above and therein entitled cause, as the originals thereof now remain on file and of record in my office at Seattle, in said District; and that the same constitute the record on the appeal therein to the United States Circuit Court of Appeals for the Ninth Circuit of the defendants above named, from the final order and decree of the Circuit Court of the United States for the Western District of Washington, rendered and entered on the 13th day of February, 1905.

I further certify that I annex hereto and transmit herewith the original citation issued in said cause.

I further certify that the cost of the foregoing record is the sum of $117.70, and that the same has been paid to me by George
126 E. de Steiguer, attorney for appellants above named.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 19th day of June, 1905.

[SEAL.] A. REEVES AYRES, *Clerk*,
By H. M. WALTHEW,
Deputy Clerk.

[Title of Court and Cause.]

Citation.

UNITED STATES OF AMERICA, *ss:*

The United States of America, to the Above-named Complainant, United States Fidelity and Guaranty Company of Baltimore, Maryland, and to Carr & Preston, Its Solicitors; Silvester E. Brown (Doing Business as S. E. Brown & Company), One of the Interveners in the Above-entitled Action, and to George Hawley, His Solicitor; to Bryant Lumber and Shingle Mill Company, a Corporation, One of the Interveners in the Above-entitled Action, and to Ballinger, Ronald & Battle, Its Solicitors; to Carstens Packing Company, a Corporation, E. C. MacDougall and H. T. Dinham, Copartners as E. C. MacDougall & Company, Interveners in the Above-entitled Action, and to Kerr & McCord, Their Solicitors; W. O. Nelson, E. E. Caine, and the C. B. Smith Company, a Corporation, Interveners in the Above-entitled Action, and to William Hickman Moore, Their Solicitors:

127 You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Ap-

peals for the Ninth Circuit at the City of San Francisco in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, in a suit in equity wherein said United States Fidelity and Guaranty Company of Baltimore, Maryland, is complainant and appellee, and the said R. M. Henningsen, Edward W. Clive, copartners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer are defendants and appellants, and the said Silvester E. Brown (doing business as S. E. Brown & Company), Bryant Lumber and Shingle Mill Company, a corporation, Carstens Packing Company, a corporation, E. C. MacDougall and H. T. Dinham, copartners as E. C. MacDougall & Company, W. O. Nelson, E. E. Caine and the C. B. Smith Company are interveners, to show cause, if any there be, why the order and decree of said Circuit Court in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court, this 26th day of May, 1905.

[SEAL.] C. H. HANFORD,
United States District Judge Presiding in said Circuit Court for the Western District of Washington.

128 Due service of the within citation and receipt of a copy thereof, and also due service of the defendants' petition on appeal and assignment of errors acknowledged this 26th day of May, 1905.

CARR & PRESTON,
Solicitors for Complainant, United States Fidelity & Guaranty Company of Baltimore, Maryland.
GEO. A. HAWLEY,
Solicitor for Sylvester E. Brown.
BALLINGER, RONALD & BATTLE,
Solicitors for Bryant Lumber & Shingle Mill Company.
KERR & McCORD,
Solicitors for Carstens Packing Company, E. C. MacDougall, and H. T. Dinham, Copartners as E. C. MacDougall & Company.
WM. HICKMAN MOORE,
Solicitor for W. O. Nelson, E. E. Caine, and The C. B. Smith Company.

[Endorsed:] No. 1205. In the Circuit Court of the United States, for the Western District of Washington, Northern Division. United States Fidelity and Guaranty Co. *vs.* R. M. Henningsen *et al.* Citation. Filed in the United States Circuit Court, Western District of Washington. May 26, 1905. A Reeves Ayres, Clerk. H. M. Walthew, Dep. Service of papers in this case may be made upon G. E. de Steiguer, Attorney for Defendants, at No. 618 New York Blk., Seattle, Washington.

129 [Endorsed:] No. 1212. United States Circuit Court of Appeals, for the Ninth Circuit. R. M. Henningsen, Edward W. Clive, Copartners, and The National Bank of Commerce of Seattle (a Corporation), and R. R. Spencer, Appellants, *vs.* United States Fidelity and Guaranty Company of Baltimore, Maryland, and Interveners, Sylvester E. Brown, Doing Business as S. E. Brown & Company, Bryant Lumber and Shingle Mill Company (a Corporation), Carstens Packing Company (a Corporation), E. C. MacDougall and H. T. Dinham, Copartners as E. C. MacDougall & Company, W. O. Nelson, E. E. Caine and the C. B. Smith Company (a Corporation), Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court, for the Western District of Washington, Northern Division.

Filed June 22, 1905.

F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER, *Deputy Clerk*.

130 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN ET AL., Appellants
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, ET AL., Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and twenty-nine (129) pages, numbered from one (1) to one hundred and twenty-nine (129), inclusive, including the index and cover thereto, to be a true copy of the printed transcript of record upon appeal from the United States Circuit Court for the Western District of Washington, Northern Division, in the above-entitled case, as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit and as said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 23rd day of July, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

131 No. 1212.

United States Circuit Court of Appeals for the Ninth Circuit.

R. M. HENNINGSEN ET AL., Appellants,
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, ET AL., Appellees,

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

132 In the United States Circuit Court for the District of Washington, Northern Division.

No. 1252.

UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, a Corporation, Complainant,
vs.
E. E. CAINE, W. O. NELSON, W. H. HUNTER ET AL., Defendants.

I, A. Reeves Ayres, Clerk of the above entitled court, hereby certify that since the rendition and entry of the judgment in the above entitled action the complainant, the United States Fidelity & Guaranty Company, paid into the registry of the above entitled court the full amount of said judgment, to wit, the sum of eleven thousand five hundred ninety-four & 50/100 ($11594.50) dollars, and that the same has been drawn out of the registry of this court by the creditors of Henningsen and Clive, in whose favor said judgment was rendered, and that the said judgment has been fully satisfied and discharged by the said complainant, the United States Fidelity & Guaranty Company, all of which appears from the records in my office.

In witness whereof, I have hereunto set my hand and the seal of the above entitled court this 27th day of October, 1905.

[SEAL.] A. REEVES AYRES, *Clerk*,
By H. M. WALTHEW,
Deputy Clerk.

(Endorsed:) No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. R. M. Henningsen, Edward W. Clive, *et al.*, Appellants, *vs.* United States Fidelity & Guaranty Company, *et al.*, Appellees. Certificate of Clerk of court below as to satisfaction of judgment. Filed Oct. 31, 1905. F. D. Monckton, Clerk.

133 At a stated term, to wit: the October term, A. D. 1905 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Fran-

cisco, on Wednesday, the first day of November in the year of our Lord one thousand, nine hundred and five.

Present: Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable Thomas P. Hawley, District Judge.

No. 1212.

R. M. HENNINGSEN ET AL., Appellants,
vs.
THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, ET AL., Appellees.

Order of Submission.

Upon consideration of the stipulation of counsel for the respective parties, heretofore filed therefor,

It is ordered that the appeal in this cause be, and hereby is submitted to the Court for consideration and decision on briefs, pursuant to the terms of the said stipulation.

134 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN ET AL., Appellants,
vs.
UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN (Doing Business as S. E. Brown & Company) ET AL., Appellees.

Opinion U. S. Circuit Court of Appeals.

Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

The record shows that on the 15th of May, 1903, the appellants R. M. Henningsen and Edward W. Clive, then being copartners, entered into a contract in writing with G. S. Bingham, Major and Quartermaster, U. S. Army, representing the Government of the United States, for the construction of certain buildings at Fort Lawton, in the State of Washington, for the faithful performance of which contract on the part of Henningsen and Clive they, as principals, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, executed a bond to the United States conditioned that Henningsen and Clive would in all respects duly and fully perform all of their agreements and obligations specified in the contract, and would promptly make full payment to all persons supplying labor or materials in the prosecution of the work therein provided for; which bond was accepted by the Government,

upon which acceptance the contract was awarded to Henningsen and Clive, and its performance entered upon by them. Subse-
135 quently and before the making by Henningsen of the assignment to the defendant Spencer, afterwards mentioned, Clive withdrew from participation in the performance of the contract under an agreement between himself and Henningsen. The contract, in so far as concerned the completion of the buildings, was fully performed, but the contractors failed to pay in full all persons supplying labor and materials in the prosecution of the work, and failed and refused to pay just and lawful claims for such labor and materials amounting, in the aggregate, to $15,409.04, and in that respect and to that extent made default in the terms, conditions, and obligations of the bond. After the contractors had so defaulted, the surety commenced suit in the court below against Henningsen, Clive, and each of the persons to whom they were indebted for such labor and materials, stating in its bill its liability upon the bond to such creditors to the full extent of the penalty of the bond, to wit, the sum of $11,625., which suit resulted in a decree adjudging the surety company indebted to such creditors of Henningsen and Clive in the full sum of $11,625., and directing payment thereof to the creditors *pro rata*, and decreeing that upon making such payment the liability of the surety on the bond be discharged

Subsequent to the execution of the bond and contract, and after Clive, under his agreement with Henningsen, had ceased his connection with the performance of the contract, and after the latter had been in large part executed, Henningsen executed to the defendant Spencer, in trust for the defendant National Bank of Commerce, of Seattle, an assignment of the balance of the money coming to him under the contract, and directing the Quartermaster to pay over to Spencer all such moneys. The purpose of the assignment was to secure the repayment of a loan made by the bank to Henningsen on or about October 10, 1903, of $3500, and subsequent loans of $1000 and $370. All of the money so loaned by the bank to Henningsen was paid by it directly to him, who disbursed
136 it without any supervision or control upon the part of the bank or of Spencer.

At the time of the commencement of the present suit by the surety, there was in the hands of the Quartermaster, representing the United States, the sum of $13,066, earned by Henningsen under the contract, which sum of money the Quartermaster was about to pay over to Spencer in pursuance of the aforesaid assignment and order. The object of this suit was, in part, to prevent such payment and to obtain a decree that such assignment and order were invalid. Upon the filing of the original bill in the court below, Henningsen, the bank, and Spencer were temporarily enjoined from receiving the money from the Quartermaster, after which a written stipulation was entered into between the complainant surety, Henningsen, Spencer, and the bank, pursuant to the terms of which $8024.21 of the $13,066 were paid to creditors of Henningsen, who had performed labor and furnished materials in the performance of the contract, and the balance, to wit, $5041.79, was applied in con-

ditional payment and satisfaction of the indebtedness of Henningsen to the bank, which amounted to $5041.79—the stipulation further providing that in the event it should be finally determined by appropriate litigation that the complainant surety was entitled to receive the last-mentioned amount, the bank would pay the same to it. The liability and loss of the surety, as finally established and decreed by the court below, in the suit hereinbefore referred to, having exceeded the said sum of $5041.79, the court below held that the surety company was equitably entitled to receive the said sum of $5041.79, and accordingly gave judgment against the bank for that sum, with costs. It does not appear that at the time that judgment was entered the surety had in fact paid to the laborers and material men the full penalty of its bond, as asked for and decreed in the suit brought by it against time and others, but it appears from the certificate of the Clerk of the court below, filed in this
137 court, that the complainant has since done so; so that the judgment of the court below is the judgment to which the appellee is entitled, if its equity to the balance of the fund is superior to that of the bank.

George E. de Steiguer, Solicitor for Appellants.
Graves, Palmer, Brown & Murphy, Solicitors for Appellee.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

Ross, Circuit Judge, after stating the case as above, delivered the opinion of the court:

The real question in the case is one of priority of equities as between the bank and the surety company. In the first place, it is to be noted that it does not appear that the money loaned to Henningsen by the bank was loaned upon the agreement on his part to use it in the performance of the contract in question, nor does it appear that as a matter of fact it was so used. Spencer, the trustee, and cashier of the bank, being asked whether Henningsen made any statement as to the purpose for which he wished to borrow money, answered:

"A. Yes; he stated at the time that he was being hampered on his Fort Lawton contract by the fact that the inspector was giving him short estimates and that he would have to have money to carry the contract through; he also stated that there were some little items of debt on the Mary Island contract, the owners of which were bothering him and that he wished to get this money for the purpose of meeting his pay-rolls and making payment on material on
138 the Fort Lawton contract and to liquidate the items mentioned above in the Mary Island contract.

Q. Did he make any explanation to you as to whether the items of debt on the Mary Island contract had anything to do with the prosecution of his work on the Fort Lawton contract?

A. He said that they were threatening to sue him and that he was afraid it would absolutely prevent him from going ahead with

his work, fearing others to whom he was owing money on the Fort Lawton contract would do the same thing.

Q. Did he make any statement as to the respective amounts which he expected to use on the different contracts?

A. He did not."

Spencer was further questioned, and testified as follows:

"Q. At the time you made Mr. Henningsen the first advance, being that for thirty-five hundred dollars, was there any arrangement between you and him as to the securing of payment of that note?

A. There was.

Q. What was that agreement?

A. He agreed he would assign and turn over to us the payments received on this contract."

The assignment by Henningsen to Spencer and the acceptance of the order by the Quartermaster of the fund which he expected to disburse for the Government, was void as against the United States, the surety, the laborers, and the material men. R. S. U. S., Secs. 3477, 3737; Prairie State Bank *v.* United States, 164 U. S. 227; McKnight *v.* United States, 98 U. S. 179; Spofford *v.* Kirk, 97 U. S. 484; United States *v.* Gillis, 95 U. S. 407; Greenville Savings Bank *v.* Lawrence, 76 Fed. 545.

Whatever equity, if any, the bank had to the fund in question, arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled
139 to assert the equitable doctrine of subrogation, but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money. Prairie State Bank *v.* United States, *supra;* Insurance Company *v.* Middleport, 124 U. S. 534; Sheldon on Subrogation, Sec. 240. Certainly the bank cannot be justly said to have any sort of equity to the entire sum of $5041.79, for it is not pretended that in making its loans to Henningsen it was understood that he was to use *all* of the money so loaned in the performance of the contract in question. It is equally difficult to see how an equity in its behalf can attach to any specific part of the fund in controversy, for the reason that the facts of the case leave it altogether indefinite and uncertain as to how much of the money loaned by the bank to Henningsen it was understood he was to use in the performance of this particular contract.

When we come to look at the equities on the part of the surety company, we find that it paid what it was compelled to pay—the full penal sum of its bond, to the laborers and material men by reason of its pricipal's failure to pay them, exceeding in the aggergate the amount of the fund in controversy. That bond was given under and in pursuance of the provisions of the Act of Congress approved August 13, 1894, entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works" (28 Stats. 278), one of the purposes of which Act was, as held by the Circuit Court of Appeals for the Eighth Circuit, in United States *v.* National Surety Company, 92 Fed. 549 and by this court in United States *v.* Rundle, 100 Fed. 400, "to afford full protection to all persons who supplied materials or labor in the construction of public build-

ings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be for the labor and materials so supplied. There was no occasion for legislation
140 on the subject to which the Act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the Government." The bond required by that Act, and in pursuance of which the bond under consideration was given, was, as said in the cases cited, "intended to perform a double funtion,—in the first place, to secure to the Government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains—the one for the benefit of the Government, and the one for the benefit of third prsons—are as distinct as if they were contained in separate instruments, the Government's name being used as obligee in the latter agreement merely as a matter of convenience."

Where, as in the Prairie State Bank and the Rundle cases, *supra*, the surety is compelled to make good the default of his principal as respects the Government, the surety is, as was distinctly held in those cases, entitled to be subrogated to the rights of the Government. Upon precisely the same principle the surety is entitled to be subrogated to the rights of the laborers and material men, where, as in the present case, it is compelled by reason of the obligations of the bond to pay them for labor and material because of the default of its principal. That right of subrogation relates back, as was held by the Supreme Court in Prairie State Bank *v.* United States, *supra*, to the time the contract of suretyship was entered into. See, also First National Bank of Seattle *v.* City Trust Safe Deposit Surety Co.,
141 *et al.*, 114 Fed. 529; Richards Brick Co. *v.* Rothwell, 18 App. Cas. (Dist. of Col.) 516.

The judgment is affirmed.

(Endorsed.) Opinion. Filed February 12, 1906. F. D. Monckton, Clerk.

142 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE, a Corporation, and R. R. SPENCER, Appellants,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN (Doing Business as S. E. Brown & Company) ET AL., Appellees.

Decree U. S. Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Decree. Filed and entered February 12, 1906. F. D. Monckton, Clerk.

143 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN, Doing Business as S. E. Brown & Company; BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation), CARSTENS PACKING COMPANY (a Corporation), E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MacDougall & Company; W. A. NELSON, E. E. CAINE, and the C. B. SMITH COMPANY (a Corporation), Appellees.

Petition for Appeal.

Now come the appellants, R. M. Henningsen, Edward W. Clive, Co-partners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, by their Solicitor, G. E. de Steiguer, and respectfully show:

That in the above entitled cause there was rendered and filed a judgment in the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco in the State of California, in the above entitled and numbered cause, on the 12th day of February, 1906, affirming the decree of the United States Circuit Court for the Western District of Washington, Northern Division in said cause, and that thereby, in said affirmance manifest error has intervened to the great damage of the petitioners;

That the matter in controversy in said suit exceeds the sum of One Thousand Dollars besides costs, and exceeds the sum of Five Thousand Dollars, besides costs, and that this is not a case in
144 which the decision of the Circuit Court of Appeals is made final, and is a proper case to be reviewed by the Supreme Court of the United States upon appeal;

That said cause arose under the laws of the United States and in particular, under "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, and involves the construction of said Act and of the bond required under said Act; and that said cause further arose under Sections 3477 and 3737, Revised Statutes of the United States, and involves the construction thereof;

Wherefore, petitioners pray for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States, and that a transcript of the record and proceedings on which said decree was based, duly authenticated, be sent to the Supreme Court of the United States; and for such other process as is required to perfect the appeal prayed for, to the end that the error therein may be corrected.

G. E. DE STEIGUER,
Solicitor for Appellants.

W. W. WILSHIRE, *Counsel.*

The petition granted and appeal allowed on giving bond in the sum of One Thousand Dollars conditioned as the law directs, this the 20th day of June, 1906.

WM. B. GILBERT,
United States Circuit Judge for the Ninth Circuit.

(Endorsed:) Petition for, and Order Allowing Appeal. Filed June 18, 1906. F. D. Monckton, Clerk.

145 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN, Doing Business as S. E. Brown & Company; BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation), CARSTENS PACKING COMPANY (a Corporation), E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MacDougall & Company; W. O. NELSON, E. E. CAINE, and THE C. B. SMITH COMPANY (a Corporation), Appellees.

Assignment of Errors.

The appellants in the above entitled cause, in connection with their petition for appeal herein, present and file therewith their assignment of errors, as to which matters and things they say: That the decree entered herein on the 12th day of February, 1906, is erroneous, to wit:—

1. The Court erred in affirming the decree of the Circuit Court, and in not reversing the same.

2. The Court erred in holding that laborers or material men upon Government work have any right to or lien upon the amount to be paid by the Government to the contractors for such work; and there being no such right, the Court erred in holding that the complainant, the Surety upon the contractor's bond for the performance of such work and the payment of such laborers and material men, had a right of subrogation to such rights or liens of laborers or material men.

146 3. The Court erred in holding that said Surety had such right of subrogation without first paying the claims of such laborers and material men.

4. As the record shows that the respondent in the Circuit Court contended that the laborers and material men had no right to the fund in controversy, and as this contention was upheld by the Circuit Court, the Circuit Court of Appeals erred in not holding that the respondent was thereafter estopped from claiming that such laborers and material men had such right to said fund, and that the respondent was entitled to be subrogated thereto.

5. It did not appear at the time the judgment was entered by the Circuit Court that the surety had in fact paid to the laborers and material men the penalty of its bond, but it is stated in the opinion of said Circuit Court of Appeals that it appears from a certificate of the Clerk of the Circuit Court that the complainant had since done so. The Circuit Court of Appeals erred in considering said certifi-

cate and in basing its opinion, decision and judgment affirming the judgment of the Circuit Court upon facts transpiring since the judgment of said Circuit Court was entered.

6. In case said surety was entitled to any subrogation whatsoever, the court erred in extending such subrogation to any amount in excess of the twenty per cent. stipulated by the contract to be reserved until full performance of the work upon the contract.

7. In the absence of any right to the fund on the part of the complainant, the court erred in holding that the respondent Bank was not entitled to retain the same both by reason of the consent of the other defendants by their answer, and by virtue of the
147 assignment to Spencer for the use of the Bank which was good as between the parties, and only void as against the Government of the United States, and those subrogated to its rights.

8. The Court erred in holding that the complainant had on any account whatsoever, any lien upon, or right to the sum of Five Thousand and Forty-one Dollars and Seventy-nine Cents ($5041.79) held by the defendant, The National Bank of Commerce of Seattle, or any part thereof, and erred in rendering judgment for the payment of the same by said Bank to the complainant.

Wherefore, the appellants pray that said final order and decree of the Circuit Court and of the Circuit Court of Appeals be reversed, and that said Circuit Court be directed to enter an order and judgment herein denying to the complainant any right to or lien upon said sum of Five Thousand and Forty-one Dollars and Seventy-nine Cents ($5041.79) held by the appellant, The National Bank of Commerce of Seattle, and find that said Bank is entitled to retain the same in payment or partial payment of its claim set forth in the answer to the Amended Bill of Complaint.

G. E. DE STEIGUER,
Solicitor for Appellants.

W. W. WILSHIRE,
Counsel.

(Endorsed:) Assignment of Errors. Filed June 18, 1906. F. D. Monckton, Clerk.

148 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN, Doing Business as S. E. Brown & Company; BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation), CARSTENS PACKING COMPANY (a Corporation), E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MacDougall & Company; W. O. NELSON, E. E. CAINE, and THE C. B. SMITH COMPANY (a Corporation), Appellees.

Bond.

Know all men by these presents: That we, The National Bank of Commerce of Seattle, as principal, and H. C. Henry and C. J. Smith, as sureties, acknowledge ourselves to be jointly and severally indebted and held and firmly bound unto the above-named complainant and respondent, United States Fidelity and Guaranty Company of Baltimore, Maryland, in the sum of One Thousand Dollars, for the payment of which we jointly and severally bind ourselves and each of us, and each of our heirs, executors, administrators and successors by these presents.

In witness whereof, the said principal has caused its corporate name to be hereunto signed and its corporate seal hereunto affixed, and the said sureties have hereunto set their hands and seals this 13th day of June, 1905.

149 The condition of this obligation is such that: Whereas, in the above entitled court and action a final order and decree was rendered in favor of the complainant and against these appellants on the 12th day of February, 1906; and

Whereas the above named appellants have taken an appeal from said final order and decree to the Supreme Court of the United States; Now therefore, if the said appellants shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation shall be void; otherwise, it shall remain in full force and virtue.

And we, the said H. C. Henry and C. J. Smith, the sureties above named, do hereby expressly consent and agree that in case of any breach in the conditions of this obligation, the said Circuit Court may, upon notice to us of not less than ten days, proceed summarily in the suit in which said bond is given, to ascertain the amount which we are bound to pay on account of such breach, and render

judgment therefor against us or either of us, and award execution therefor.

NATIONAL BANK OF COMMERCE,
By H. C. HENRY, *Its President,*
And by O. A. SPENCER, *Its Secretary.*
H. C. HENRY. [SEAL.]
C. J. SMITH. [SEAL.]

150 STATE OF WASHINGTON,
Western District of Washington, County of King, ss:

H. C. Henry and S. J. Smith being each first severally sworn, does each of and concerning himself, depose and say: I am one of the sureties named in and executing the foregoing bond: I am not an attorney or counsellor at law, Sheriff, Clerk or Marshal, or officer of any kind whatsoever of any court of the State of Washington, or of any court of the United States, or of any court whatsoever; I am a resident and householder within the Western Judicial District of the State of Washington; I am worth the sum of One Thousand Dollars in property situated within the State of Washington, and within the Western District of Washington, over and above all my debts and liabilities, and exclusive of property exempt from execution.

H. C. HENRY.
C. J. SMITH.

Subscribed and sworn to before me this 13th day of June, 1906.
S. G. GRAVES,
Notary Public in and for the State of Washington, residing at Seattle.

The foregoing bond is hereby approved this 20th day of June, 1906.
WM. B. GILBERT,
United States Circuit Judge for the Ninth Circuit.

(Endorsed:) Bond on Appeal to Supreme Court U. S. Filed June 20, 1906. F. D. Monckton, Clerk.

151 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN ET AL., Appellants,
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, ET AL., Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, Etc.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing

twenty-one (21) pages, numbered from one (1) to twenty-one (21), inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed, as the same remain of record in my office; and that the same in connection with the preceding certified copy of the printed transcript of record upon appeal from the United States Circuit Court for the Western District of Washington, Northern Division, constitute a true copy of the printed record upon which the above-entitled case was heard in the said Circuit Court of Appeals and of all proceedings had therein, and the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled case.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 23rd day of July, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

152 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN, Doing Business as S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation), CARSTENS PACKING COMPANY (a Corporation), E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MACDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE, and THE C. B. SMITH COMPANY (a Corporation), Appellees.

Citation.

THE PRESIDENT OF THE UNITED STATES:

To United States Fidelity and Guaranty Company of Baltimore, Maryland, and to the Intervenors, Sylvester E. Brown, doing business as S. E. Brown & Company, Bryant Lumber and Shingle Mill Company (a corporation) Carstens Packing Company (a corporation) E. C. MacDougall and H. T. Dinham, Co-partners as E. C. MacDougall & Company, W. O. Nelson, E. E. Caine and the C. B. Smith Company (a corporation), Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, in the District of Columbia, sixty days after the date of this citation,

pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein R. M. Henningsen, Edward W. Clive, co-partners, and The National Bank of Commerce of Seattle (a corporation) and R. R. Spencer are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said
153 appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Wm. B. Gilbert, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 20th day of June, 1906.

WM. B. GILBERT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Due service of the within citation and receipt of a copy thereof, and also due service of the appellants' petition on appeal and assignment of errors acknowledged this 29th day of June, 1906.

JAMES B. MURPHY,
GRAVES, PALMER & MURPHY,
Solicitors for United States Fidelity & Guaranty Company of Baltimore, Maryland.
GEO. A. HAWLEY,
Solicitor for Sylvester E. Brown.
BALLINGER, RONALD & BATTLE,
Solicitors for Bryant Lumber & Shingle Mill Company.
KERR & McCORD,
Solicitors for Carstens Packing Company, E. C. MacDougall and H. T. Dinham, Co-partners as E. C. MacDougall & Company.
WM. HICKMAN MOORE,
Solicitor for W. O. Nelson, E. E. Caine and The C. B. Smith Company.

154 [Endorsed:] Form No. 102. Docketed. No. 1212. In the Circuit Court of Appeals of the United States for the 9th Circuit. R. M. Henningsen *et al.*, Appellants, *vs.* United States Fidelity & Guaranty Co. *et al.*, Appellees. Citation. Filed Jul- 12 1906. F. D. Monckton, Clerk. Service of papers in this case may be made upon G. E. de Steiguer, Attorney for Appellants, at Room 618, New York Block, Seattle, Washington.

Endorsed on cover: File No. 20,326. U. S. circuit court of appeals, 9th circuit. Term No. 361. R. M. Henningsen and Edward W. Clive, copartners; The National Bank of Commerce of Seattle, and R. R. Spencer, appellants, *vs.* United States Fidelity & Guaranty Company of Baltimore, Md.; Sylvester E. Brown, doing business as S. E. Brown & Company; Bryant Lumber & Shingle Mill Company; Carstens Packing Company; E. C. MacDougall and H. T. Dinham, copartners as E. C. MacDougall & Company; W. O. Nelson; E. E. Caine, and The C. B. Smith Company. Filed August 7, 1906. File No. 20,326.